

**The Petition of William Roberts Marshall QC, SC**

**Resident Justice of Appeal**

**In Fiji since 16<sup>th</sup> July 2010**

1. This petition is addressed to the Prime Minister, Commodore Voreqe Bainimarama and to the Military Council.
2. One object of this petition is to explain, with evidence supported by documents, that since 9<sup>th</sup> April 2009 there have been progressive inroads into the independence of the judiciary which process has culminated since mid-April 2012 in a judiciary which at all levels now does what it perceives is required of it by the Executive. At all levels, judges having heard the evidence, having researched and found the applicable law, and having listened to the submissions of the parties now ask themselves, "Now what would the Attorney General like my decision and judgment in this case to be?" and make their judgment and orders in line with their answer.
3. A second object of this Petition is to persuade you that you should change this Executive policy forthwith. The commendable objective central to your dismissal of the Qarase government in late 2006 was to have a nation where everyone regardless of race are Fijian citizens; where government is inclusive rather than them extractive, multi-racial rather than racist, and honest rather than corrupt. Such a government is transparent in its actions so that its citizens can appreciate its problems and performance. If there is nothing to hide then transparency will be appreciated by informed opinion and that good opinion will trickle down to the grass roots.

4. A transparent non-corrupt inclusive government which values and abides by the rule of law has a chance of being elected whenever, inevitably, some kind of electoral process is put into action and Fijians must vote. You have said you will win in 2014 against Qarase and the SDA. But you will not if the perception of voters is that your government has undermined the rule of law to the detriment of innocent individual citizens of Fiji who have become victims of miscarriage of justice. Another matter is that citizens of Fiji do not want a government which if they have a civil or criminal case before the courts, will ensure a result in favour of the Executive. They see confidence in the independence and impartiality of the courts as essential.
  
5. I add that non-transparency in handling the FNPF "lack of funds" issues which could have been shown to have resulted from the corrupt and extractive policies of the Qarase government has caused you loss of support amongst those most likely to support you. Issuing decrees to suppress court proceedings is seen as a denial of the rule of law. The government's motive is seen as a move to cover up the wrongdoing and abuse of power that has lead to your decisions. Where the elderly in any country have made contributions in a fully paid up provident scheme, they tend to punish those who have partially or wholly remove their promised benefits. Many of your supporters will see this as a reason not to vote for you or your party in elections. I will address electoral and constitutional reform briefly below.
  
6. I have no personal interest in this matter. My intention was to take Fijian citizenship, serve the people and stay here. I came to Fiji, personally assured that my role was to serve the people of Fiji by applying the rule of law and upholding the independence of the judiciary if the Executive sought to undermine it. It is now clear that my activities in preventing executive interference are completely undermined. I have no role in legal or judicial affairs in Fiji until this is changed. I

leave at the end of my contract on 28<sup>th</sup> June 2012.

7. I was well read about Fiji and well briefed when in 2009 I took the office. By late 2006 the Qarase regime had to be replaced. An inclusive regime for a short interim period was vital. Then there would be a new electoral system and elections. But Australia and others could not see that there was no democracy under Qarase's corrupt, racist and extractive government. The first coup ever in Fiji away from extremism was denounced. I know that you faced personal danger in taking the necessary steps in late 2006. You had the vision to see what was wrong. You had the courage to take action. Now there is a likelihood of a dark age with extremist policies impoverishing everyone. Those who can will emigrate. The rest will suffer except for those in power who will extract for themselves every last dollar from the state.
8. This new dark age for Fiji may be averted. But it will only be prevented if there is a clear and immediate change from subverting the rule of law and there is transparency in public affairs.
9. I consider the reforms relating to investigation and prosecution of corruption and misconduct in public office the most important innovation in your time. FICAC if properly used will work in Fiji as it has in Hong Kong and Singapore. Public corruption is the enemy of an inclusive society and of economic progress that will benefit all the people. If only perceived political opponents are targeted, the new institutions will not make the difference it should do. FICAC should be investigating misconduct in public office and corruption that is taking place now. Madam Justice Shameem has praised my restatement of the law of misconduct in a public office and abuse of power in my judgment dismissing the appeals of Peni Mau and Mahendra Motibhai Patel. She says my legislative suggestions must be implemented. She is supportive of my resolution of a

number of other issues raised in the appeal. The irony is that the Attorney General and his agents by a process of misconduct in a public office tried to prevent me sitting on the case.

10. Even before 1970 lawyers in Fiji cheated their clients and stole their property. So when your government brought lawyers certification and discipline into the public sector, it was a necessary move which was applauded by informed opinion. It is one of the best things that this government has done. Having ex Justice Connors as Commissioner worked very well. Someone well versed in civil law is required. Even better if they know how civil lawyers in Fiji operate. Some time ago in about February 2012 Commissioner Connors was fired by the Attorney General. His crime seems to have been not accepting what the Attorney General and the Chief Registrar wished to do in the case of an employed solicitor, Ms Siteri Cevalawa, who did not pay for her certificate on time. Her employers were at fault. She was properly being disciplined and Commissioner Connors did not think that her default should prevent her from practice and her livelihood. So he asked the Chief Registrar to regularize her status in the mean time. This was refused. Foolishly, Commissioner Connors issued an order to the Chief Registrar. It was foolish because he did not have powers within the Legal Practitioners Act. I had to stay the order. But the Commissioner was trying to deliver fairness and justice to the practitioner before him. So for acting fairly and justly, but contrary to what the Attorney General and the Chief Registrar desired of him, he was fired. Justice Paul Madigan is a person of integrity. I have known him for many years. But he has always been a criminal lawyer. He does not have the experience and knowledge to conduct disciplinary proceedings successfully. The Attorney General undermined your government in respect of an important policy which had popular support.

11. Fiji was broke when you dismissed Qarase. It had been plundered to the point of insolvency. No serious infrastructure had been undertaken since independence in 1970. It is vital to inclusive government with working institutions to have the rule of law and the independence of the judiciary. Two eminent American academics have just written a book about the creation of wealth. The title is "Why Nations Fail: the Origins of Power Prosperity and Poverty". They are Daron Acemoglu an economist of MIT and James Robinson Professor of Government at Harvard University. I include the whole article which is a book review from "The Economist" March 10<sup>th</sup> 2012 in the documents. (Document 1) The following paragraph focuses on the message:

*"The authors offer instead a striking diagnosis: some governments get it wrong on purpose. Amid weak and accommodating institutions, there is little to discourage a leader from looting. Such environments channel society's output towards a parasitic elite, discouraging investment and innovation. Extractive institutions are the historical norm. Inclusive institutions protect individual rights and encourage investment and effort. Where inclusive governments emerge, great wealth follows."*

You inherited a situation where neither private institutions nor sovereign lenders will lend money to Fiji. Nor will the World Bank. You have had the vision to obtain Chinese assistance. Fiji has to pay in part. But you have moved away from the "extractive" culture by practising inclusiveness. But if you now create "weak and accommodating institutions" the inclusive policy will fail. If that happens "great wealth", or indeed any wealth, will not follow.

### **The Rule of law and the independence of the Judiciary in Fiji**

12. Before 1970 and up to 1988, the existence of the Privy Council as a second tier of appeal in civil and criminal cases deterred the Executive from any interfering with the independence of the Fiji judiciary. However, after 1970 equality before the law began to suffer. It did so because the Executive would be selective as to which offenders would be prosecuted. In some areas enforcement by investigation and prosecution became a dead letter. In other areas there was selective targeting. If one was close to those in power one was unlikely to be prosecuted. If on the other hand one was perceived to be a political opponent of the Executive, and there was a case against one, one was very likely to be prosecuted. Until about 1988 this trend was visible but not extensive.
13. In the period 1988 to 2000 the non-investigation of public corruption offences and “misconduct in a public office – abuse of office” became extensive. While individual fraudsters, who obtained by false pretences from ordinary people were prosecuted, commercial crime on any scale was not investigated or prosecuted. In this period visiting Justices from Australia and New Zealand including luminaries such as Lord Cooke of Thorndon and Sir Anthony Mason maintained high standards and maintained the rule of law and the independence of the judiciary. In this period both the Court of Appeal and the Supreme Court of Fiji employed these visiting judges sitting together with a local justice such as C.J. or the President of the Court of Appeal.
14. Immediately after the 2000 coup the judiciary regained its reputation and was independent for a while. Anthony Gates J, as he then was, ruled in the Chandrika Prasad case, that the Constitution had not been abrogated. But between 2002 and 2007 with Qarase and his racial supremacist SDA party in charge, the situation deteriorated. A faction of Fiji based judges, lead by Daniel Fatiaki, Michael Scott and Gordon Ward identified with the Qarase government and gave legal advice to it. The judges were wholly split and the judiciary was

dysfunctional. Justices Gates, Shameem and Byrne were isolated. In this period there were several decisions in which the judiciary were influenced by the Qarase government to acquit or otherwise favour persons accused of offences on or about the time of the Speight coup in 2000. In the mutiny trial of Ratu Inoke Takiveikata after Justice Anthony Gates had convicted him on 4 counts, there was evidence from two witnesses who claimed they had met Justice Gates at a social event before the trial and Justice Gates had said in respect of Ratu Inoke Takiveikata, "I will put him away." There was an appeal on bias and the appeal judges ordered that Justice Gates' counsel could not cross examine these two witnesses. The appeal judges then acquitted Ratu Inoke Takiveikata. This was a travesty of justice and the rule of law. The judges involved may have been political supporters of the Qarase government. But no judge should favour what the Executive wish the judiciary to do in a case before him or them where the facts and the law do not remotely support the outcome wished for by the Executive. The Qarase government were not concerned either about the rule of law or the independence of the judiciary. Then there is the case of Lautabui and others. This involved the incident in Naitaisiri in which, in 2000, Nimacere led a number of armed men ambushing a military vehicle. A policeman and a soldier were killed and others injured. Justice Shameem convicted Lautabui and two others. On the evidence and the law she was correct in doing so. But the Supreme Court acquitted them in a judgment, political rather than judicial in which proper analysis of the law was ignored in favour of achieving a result contrary to the rule of law. The proper independence and impartiality of the judiciary was ignored by these judges. The institution of the judiciary was damaged. Finally, there is the case of Ratu Rakuita Vakalalabare who was sworn in on live television as one of Speight's ministers. The Qarase government wished to influence his trial for taking an unlawful oath in his favour. Michael Scott J was overtly on side with government being one of those giving legal advice to the government. His relationships with Justices Gates, Shameem and

Byrne were poisonous. If after a fair trial before one of these judges, Justice Scott was on an appeal panel, he was very likely to allow the appeal because of his emotional disposition towards those Judges. Madam Justice Shameem had convicted Ratu Vakalalabure in the High Court. Justice Scott was also likely to accommodate an unjust outcome desired by the Qarase government. He was designated to sit on the Ratu Vakalalabure case in the Supreme Court. Madam Justice Nazhat Shameem was concerned that if Michael Scott sat in the Supreme Court the judiciary would not be and would not be seen to be impartial. She wrote to the Chief Justice Daniel Fatiaki:

*"The principle to be protected here is the absolute impartiality of the judiciary. Indeed if public confidence in the judiciary is to be maintained then that absolute impartiality must be protected at all costs."*

The Supreme Court rejected Madam Justice Shameem's petition. Justice Michael Scott sat on the petition. On a point not raised in Ratu Vakalalabure's petition, the Supreme Court reduced the sentence of 6 years to one of 4 years.

15. In this period it may be that visiting Justices, mostly from Australia were influenced to side with the pro Qarase faction within the judiciary.
  
16. In 2004 reflecting the concerns over interference with the rule of law and judicial independence in Fiji, Madam Justice Nazhat Shameem delivered a paper entitled *"The rule of law and the independence of the Judiciary in Fiji"* to the International Commission of Jurists. Their conference was in Queensland. I agree with what she said completely. The importance attributed by her to the rule of law and the independence of the judiciary is even more applicable to the situation in Fiji in 2012. This paper is Document No. 2 in the bundle of Documents herewith.



17. In 2006 Madam Justice Nazhat Shameem delivered a paper entitled "*Maintaining Judicial Independence in Fiji*" at the International Women Judges Conference held 3-7 May 2006.

I cite and commend the whole paper as extremely applicable to the present situation in Fiji. The whole paper is relevant but I cite here the opening remarks.

*"The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."*

Basic Principles on the Independence of the Judiciary (UN General Assembly 1985)

**Introduction**

*It is often said that judges are the guardians of the rule of law, and that because the greatest threat to the rule of law is the refusal of the executive to accept the concept of equality before the law, and the subjugation of the government to the law, the judiciary must therefore guard particularly against executive attacks on the independence and impartiality of the judiciary. This position cannot be argued against, whether you are a judge in Australia, or in Latvia. In Fiji, we judges have had to move from the mere mouthing of platitudes about the independence of the judiciary, to enforcing it as a live principle, even when it has brought some judges to a position of opposition to the Chief Justice of the day."*

This paper is Document No. 3 in the attached bundle.

18. On 17<sup>th</sup> January 2007 shortly after you dismissed Qarase and his government, Anthony Gates was appointed Acting Chief Justice of Fiji. There then followed a period when the Executive lead by you did not directly or indirectly seek to

influence the judiciary in its proper decisions. The independence of the Fiji judiciary was in this period respected. But there was one case that had the potential for tension between the Executive and the Judiciary. It was the State v Patrick Nayacalalagi and others. It involved nine police and army personnel who, following your necessary taking over of government, attended at Namaka taking on the role of investigating and punishing crime. Daniel Goundar J found all nine guilty of manslaughter rather than murder and on four counts of assault occasioning actual bodily harm.

19. In his sentencing judgment on 17<sup>th</sup> March 2009 Daniel Goundar J said:

*"[8] While I consider your motives to arrest the deceased and the complainants were to maintain law and order in the country, I cannot ignore that you breached your legal duty to protect them from any harm whatsoever whilst they were in your custody. Instead of being the custodian of law, you took the law into your own hands and became both the jury of guilt and executor of punishment. Every detainee in this country is entitled to the constitutional guarantees such due process of law and protection from degrading and inhumane treatment. By your conduct you denied the deceased and the complainants the due process of law that you enjoyed in this trial. The deceased and the complainants were not given an opportunity to be heard and to defend themselves. You punished them without a finding of guilt. They were subjected to degrading and inhumane treatment as a form of punishment. They were made to strip and do military type physical exercises. During the exercises they were continuously kicked, punched and hit."*

20. On 17<sup>th</sup> March 2009 Daniel Goundar J was arguably the most able judge dealing with criminal cases in Fiji. His view was that whether the Executive liked it or not the rule of law in Fiji required these convictions and sentences. Just because there are good reasons for taking over the government those

supporters in the army and police who act unlawfully to the detriment of citizens must be dealt with fairly and punished appropriately. The new regime must see that this is the only acceptable outcome. Now and for the future, however necessary it is to dismiss a government, there must be no favouring of supporters who act illegally in the aftermath in this way. I am sure that you and the Military Council appreciated the importance of Daniel Goundar J doing what he did. To put pressure on the judiciary to give favour to supporters was one of the unlawful things the Qarase government did; you would not wish to do the same kind of thing. There was no response from your government in March 2009. That was an appropriate stance for your government.

21. But then came an illegal exercise of sovereignty by Australia who sent three of its citizens who had, as part-time appeal judges, sworn an oath to serve the people of Fiji, with a pre-written judgment delivered on 9<sup>th</sup> April 2009 that amounted to an act of Australian sovereignty contrary to the interests of the Fijian people. It destroyed the institutions of the Fijian government that had necessarily arisen if the Qarase government had, wholly justifiably, been replaced. But then Australia is running a cold war against Fiji. Unfortunately, blows from the enemy should not give rise to irrational responses aimed at undermining the independence of the Fijian judiciary. Whatever is done in response, good government for the Fijian people must have priority.

22. When after the judiciary was dismissed it came to re-appointing judges who were competent and trustworthy, the Attorney General refused to re-appoint Daniel Goundar. This was because he had done the right thing in the case of Patrick Nayacalalagi and others. It seems the Executive had expected him to support an unstated Executive desire that these law breakers should not be dealt with as required by the law of Fiji. However, Anthony Gates C J had not yet accepted re-appointment. He would only come back if Daniel Goundar

was also re-appointed. There was no other choice for C J if Madam Justice Shameem was not prepared to act. So the Attorney General accepted defeat and Daniel Goundar was re-appointed. Anthony Gates was sworn in a Chief Justice.

23. If one wishes to create a judiciary subservient in its decisions to Executive views and interests it can be done by :-

- (a) directly telling judges in cases to find for the Executive in their judgments
- (b) creating an atmosphere within the judiciary whereby the judges become aware that the Executive generally expects judgments in its favour
- (c) appointing judges whose background leads them to expect that the Executive must be given judgments in its favour
- (d) avoiding any security of tenure for judges so that every judge know that he can be dismissed with one month's notice
- (e) dismissing or non-renewing judges who have upheld the rule of law with integrity so that other judges who do not want to be dismissed give judgments favouring the Executive, contrary to their own view of the law and the facts, in order to remain in post.

24. The common law has dealt with security of tenure for judges in order to avoid Executive pressure succeeding. Generally, superior court judges held office during their good behavior. The Latin phrase is that they cannot be dismissed "*quamdiu se bene gesserint*". In England they held tenure unless impeached by votes of both Houses of Parliament. In Fiji after 9<sup>th</sup> April 2009 every judge has two year contracts with a right in the State to dismiss on one month's notice. This is justified by the need for loyalty to your government. But after 9<sup>th</sup> April 2009

appointment would be on the basis that only those loyal to your government would be appointed. The real reason for lack of security of tenure is to provide the levers to ensure that the judiciary will give judgments favouring the Executive in general and in particular cases. No judge of competence and integrity has any difficulty in upholding the Executive where the facts and law should be found in favour of the Executive. I spent 20 years as Senior Government Counsel in Hong Kong representing the Executive in the highest courts. It was a shared expectation that the Executive put its case and won or lost on merits. It was also a shared expectation that independence of the judiciary was a fundamental premiss of the rule of law.

## **PART 2**

### **EVIDENCE AND DOCUMENTS RELATING TO MY TIME AS RESIDENT JUSTICE OF**

#### **APPEAL FROM 16<sup>TH</sup> JULY 2010 TO DATE**

##### **My credentials and my recruitment**

25. Having been called to the Bar in 1968 in London I was recruited to a senior (DLJ 2) position with the Hong Kong Government in 1980. I then became what in effect was Civil Treasury Counsel for HKG between 1987 and 2005 as a senior government counsel (in house) and later briefed on fiat while I was at the private bar in Hong Kong. I became Queen's Counsel in 1989 and Senior Counsel at the time of the handover to China in 1997. At Document No. 4 is my Resume up until 2009. At page 5, I give four referees including a former Solicitor General of England and Wales. Also the common laws world's leading administrative and human rights lawyer at the present time. Also a former Attorney General of Hong Kong as well as the Solicitor General of Hong Kong.

26. In January 2009 my colleague James Collins was recruited to work with the Attorney General in Fiji. He was present in April 9<sup>th</sup> 2009 and the aftermath of the

Australian lawyers' decision. He was in frequent communication with us in Garden Chambers in Hong Kong. Unfortunately, for health reasons he returned to Hong Kong after six months in Suva. He was working closely with Christopher Pryde the Solicitor General and did not directly have dealings or encounters with the Attorney General. When he returned to Garden Chambers in Hong Kong he had been asked to look for suitable people who might be recruited by Fiji. James Collins gave me a reference and recommended me. At Document 5 is my letter of 28<sup>th</sup> September 2009 to Christopher Pryde expressing my interest in being an appeal judge in Fiji. After exchange of e-mails I was interviewed at Garden Chambers in Hong Kong on the 28<sup>th</sup> October 2009. On 4<sup>th</sup> November 2009 Christopher Pryde e-mailed (Document No. 6 )

*"I have been in contact with the Chief Justice and he would be pleased to see you in Fiji if you are available during any of the following dates...."*

I and my wife came to Suva for four days and I met Anthony Gates C J on 25<sup>th</sup> November 2009 in his Chambers.

27. Very quickly Anthony Gates established that Fiji's need for a Resident Justice of Appeal and my desire to move to fill such a post represented a suitable confluence of interests. He was appreciative of the fact that my career had covered the whole spectrum of work that comes before appeal courts. Quite quickly the conversation moved to the issue of "*judicial integrity*" and whether I would uphold the independence of the judiciary if the government should improperly pressure me to give a judgment in its favour. I replied that I had practised law for 41 years and had jealously preserved my good reputation and my integrity. If the government put pressure on me to side with it against my honest assessment of the law, the facts and the merits, I would simply walk away from being a judge in Fiji. Anthony Gates C J agreed that that had always been his view. He assured me that your government had respected and would

continue to respect the independence of the judiciary. Since he was satisfied of my integrity in this matter he offered me the job of Resident Justice of Appeal and wished me to be in Suva and "in post" by the end of January 2010. I returned to Hong Kong. By 2<sup>nd</sup> December 2009 I had given signed answers to a number of questions on a document headed "Expression of Interest" which asked about past criminal offences and similar matters including health and bankruptcy. On or about 4<sup>th</sup> December 2009 copies of all my certificates and appointments were sent as requested. I also sent a medical report from my doctor. In addition I sent a Certificate signed on behalf of the Hong Kong Bar Association (Document No. 7 ) which outlined my career and concluded that on 3<sup>rd</sup> December 2009 I was a Senior Counsel with long service and good standing.

28. In 2009 the Chairman of the HK Bar Association was Russell Coleman S C who is a UK expatriate in Hong Kong. By a letter dated 7<sup>th</sup> December 2009 (Document No. 8) he wrote to me. It is quite likely that the British Consulate in Hong Kong were concerned about judicial appointments in Fiji and requested him to write to me. In his letter he said:

*"I refer to your letter of 30<sup>th</sup> November 2009 to apply for a Certificate of Good Standing from the Hong Kong Bar Association, as part of the requirements for the appointment of the judicial post of resident Court of Appeal Judge in Fiji. I believe the Certificate has been issued to you on 3<sup>rd</sup> December 2009. May I take this opportunity to congratulate you on the offer for the judicial post of resident Court of Appeal Judge in Fiji. I hope that if you do indeed take up the post you will strive to support the re-establishment and maintenance of the rule of law in Fiji."*

I replied on 9<sup>th</sup> December 2009 which is Document No. 9

*"Dear Russell,*

*Thank you for your good wishes re the Fiji appointment. It is because of the need to uphold the rule of law that I believe I can be of service to the people of Fiji. I have been assured by Chief Justice Anthony Gates that there is and will be no pressure brought by the executive to influence judges' decisions in any cases."*

I could not make arrangements to sell up in Hong Kong or to move our household goods to Fiji without letters of appointment and letters of comfort from your government. I wrote to C J explaining. He wanted me to be "in place" by 1<sup>st</sup> February 2010. I was surprised when he e-mailed by reply (Document No. 10 ) on December 20<sup>th</sup> 2009 and said:

*"I am afraid this business is taking far longer than anticipated and we have been unable to assist with your personal admin. Time schedule. My recommendation has gone to the appropriate authorities. A cyclone, water and power cuts, climate change conferences, and end of year matters have not helped to make for a speedy decision. I have left word with the Chief Registrar that as soon as a favourable decision is arrived at, that she issue you with a letter of comfort so that you and your wife may enter Fiji.*

*Chief Registrar will also assist in providing you with the approximate benefits and salary package. Start date is likely to be around 1<sup>st</sup> Feb 2010. I fly out of Fiji tomorrow and will be back in the office by 18<sup>th</sup> Jan. From time to time I will look at e-mail."*

29. I was then even more surprised when Christopher Pryde who had recently interviewed me at Garden Chambers Hong Kong e-mailed me (Document No. 11 ) on 25<sup>th</sup> January 2010, and said:



*“As part of our usual preliminary background checks, we obtained a report from the Fiji Financial Intelligence Unit: the requisite part of which is copied below.*

*“Checks with overseas counterparts provided the following information:*

*\* There are no records of a **Mr. William Roberts Marshall** registered with the Bar Council, the Solicitors' Regulation Authority or the Law Society for England and Wales*

*\* A search for **Mr. William Roberts Marshall** was also conducted in the database of the Faculty of Advocates (Scotland) and found no advocate (Scottish equivalent of a barrister) named **Mr. William Roberts Marshall**.*

*We were unable to find any information on the Garden Chambers in Hong Kong which is reportedly **Mr. William Roberts Marshall's** current employment.”*

30. By early December 2009 all my certificates were in the hands of the Fiji government. So these enquiries, if made at all, were made in bad faith and the reported research results were either untrue or irrelevant. I replied on the same day (25<sup>th</sup> January 2010) (Document No.12 )

*“2) To take the last point first which relates to Garden Chambers. I saw you at Garden Chambers in late October 2009. The Bar List is published frequently by the Hong Kong Bar Association. I enclose from the 2009 (October) publication a copy of the frontispiece in the English language and a copy of p. 283 which shows the entry for Garden Chambers. The Hong Bar Association does not register Chambers but registers individual barristers as members. But they recognize sets of Chambers both in communicating with individual barristers and in assisting solicitors who wish to engage the services of barristers.*

*3) To take the second point next. I qualified in English law at LSE in 1967 and was called to the Bar by the Inner Temple in November 1968. Although of Scottish birth and descent, I was never qualified to practice as an advocate in Scotland and have never applied for membership of the Faculty of Advocates*

in Scotland.

4) *The first point. Having never been a solicitor in England and Wales, I have never been involved with either the Solicitors Regulatory Authority or the Law Society. When I commenced practice as a barrister in 1968, I had to be and was a member of the General Council of the Bar as I believe it then was. I left practice in England in 1980 and came to work for the Hong Kong Government and the Attorney General of Hong Kong. I retained my various bar memberships. But some years later, the Bar Council decided that overseas English barristers not practicing in England and Wales, would be regarded as employed barristers whether in private practice overseas or not. The annual fee for this is minor and I pay it and receive once per month the official magazine of the Bar Council which is called "Counsel".*

5) *Should any other points arise, please revert immediately."*

31. There followed a further e-mail from me to Christopher Pryde attaching copies of the English Law List 1975 with reference to my practice at the English Bar at 5 King's Bench Walk, London. I also enclosed my correspondence with the Bar Council in England & Wales confirming in September 2009 my membership as an employed barrister and in April 2009 enclosing my membership card.

32. It was obvious to me that my appointment was being intentionally blocked by the Attorney General. Christopher Pryde said that it was the Attorney General who was holding the file. Christopher Pryde also confirmed that all my answers were satisfactory. I, and I believe, Anthony Gates were becoming more and more frustrated.

33. By Document No. 13 I wrote on 22<sup>nd</sup> March 2010 a letter offering to return to Suva to be interviewed by the Attorney General. I said:

*"Dear Christopher,*

*I was sorry to hear that the northern islands were badly damaged by yet another tropical storm. I have no doubt that the government and army will be working very hard to provide relief from this further random blow from nature.*

*This summer seems to have had more than its share of typhoons.*

*I hope that the efforts to recruit judges are producing some results. I know that the Chief Justice and the Administration are committed to the rule of law in Fiji which at present means the*

*appointment of judicial personnel who are well qualified men and women of integrity, competence, experience and impartiality.*

*I have no complaints about the time it takes to make appointments. I have been around governments a lot in my career to date and I know that there may be shades of opinion about many things including the timing when decisions should be made.*

*On 10<sup>th</sup> February 2010, my secretary Mrs. Sandra Dalton spoke to you and you said that I had laid to rest concerns over factual matters about my career and that the appointment file had been passed on to the Attorney General. You hoped that there would be a decision quite soon.*

*I have used the "factual matters" on a couple of occasions since 10<sup>th</sup> February 2010 to keep in touch although there can have been no adverse issue still extant.*

*Having run out of excuses, I would like your opinion and that of the Chief Justice on the following proposal. I am prepared to re-visit Suva and meet with yourself, the Chief Justice and/or someone from the administration side such as the Attorney General, if that might serve to resolve outstanding issues about timing, remuneration or indeed anything that is relevant. I can come at short notice now that there is a twice weekly Hong Kong direct flight. There is no point in*

*coming if anyone who might assist is out of Fiji or for any reason not able to see me.*

*If it is your opinion or that of the Chief Justice for any reason that this is not a good idea, I will cool my heels and await a decision. I feel I would like to orchestrate and arrange our move from Hong Kong to Fiji as soon as possible."*

34. There was no reply to this letter but it seems to have been effective in a limited way. On 26<sup>th</sup> March 2010 I received the following e-mail from Anthony Gates (Document No.14 )

*"Dear Mr Marshall,*

*We appear to be at the end of what has proved an especially long tunnel. I am not sure why. Anyway I thought I should let you know that your name is ready to go up to Government House for approval and appointment. H E is in HK this w/e for the Hong Kong Sevens Tournament but will be back in Suva on Wednesday 1<sup>st</sup>. I would estimate that the appointment should go through immediately after Easter, without further hiccup.*

*I look forward to your arrival thereafter.*

*with my good wishes*

*Anthony Gates*

*CJ"*

35. The tunnel was to prove even longer. My secretary phoned Christopher Pryde on 27<sup>th</sup> April 2010 and her file note says:

*"Pretty sure [the appointment] is far advanced. Christopher Pryde will make enquiries and will revert as soon as possible."*

My secretary also told Christopher Pryde that she would need to know something definite at the beginning of May if she was going to have time before her leave to assist with my moving arrangements.

36. At the beginning of May 2010 Christopher Pryde or the Chief Justice reported that the papers for my appointment had finally gone to H.E. the President at Government House. I decided to sell up and pack up and move my household belongings to Fiji. I then went on leave to London, Scotland and Ireland. I prepaid my removal expenses and my air tickets to Fiji without an appointment offer. Nor was there a contract provided to me. It was to be late September 2010 before my contract was handed to me. A letter of appointment from The President dated 4<sup>th</sup> June 2010 was sent to me while I was in Scotland. This is Document No. 15. My wife and I duly arrived in Fiji on 16<sup>th</sup> July 2010.

37. From later events, I deduce that the Attorney General did not want anyone who would uphold the rule of law and the independence of the judiciary from Executive interference. Finally he was more anxious to replace Acting President of the Court of Appeal, John Byrne, who was making, in his view, outrageous anti-Executive decisions in granting stays to crooked lawyers and granting bail pending appeal in criminal cases. Also because of John Byrne on 5<sup>th</sup> July 2010 acquitting in the Court of Appeal an Australian, Simon John McCartney, who had been convicted in the High Court of murder. In the end, the balance tilted in favour of the Attorney General terminating John Byrne's contract even though it would mean appointing me with my expressed intention to uphold the rule of law. By this time it is clear that the Attorney General was interfering in the hearing of cases and was pursuing a policy of having a judiciary which at all levels would do as he wanted. On the other hand the Chief Justice was lead to believe that the policy of non-interference which had been in place between the end of 2006 and 9<sup>th</sup> April 2009 was still in place and would continue going forward. In all this I believe that Anthony Gates was sincere in his dealings with me. In 2010 he did not believe that the Executive would adopt a policy of interfering with judicial independence. He was deceived into thinking the Attorney General also believed and supported this. But at this time the Attorney

General was secretly determined to pressure the judiciary into compliance with Executive wishes in any particular case.

**The case of Zafir Tarik Ali and others**

38. Shortly after I assumed judicial office I had to deal with a bail application by Zafir Tarik Ali, Taimur Ali, Tahir Ali and Chandlesh Ganesh. They had been convicted of murder by Justice Priyantha Fernando after unanimous "guilty" opinions by three assessors on 7<sup>th</sup> July 2010.

39. At Document No. 16 is my ruling of 9<sup>th</sup> September 2010. I ruled that while there was a strong case in favour of the appeal, bail pending appeal should be refused. I gave leave to appeal generally to the four appellants. I ordered that the judges' notes and the record be prepared expeditiously and that the matter be listed for hearing in the first available session after the record had been prepared.

40. Anthony Gates C J said two things to me when I said that the appellants' case, at least on the limited materials I had seen, was a strong one. The first was "*It seems there is no smoking gun.*" The second remark was : "*One of the appellants is Australian or is an Australian resident.*" At some point either he or someone else said that Australia through its Commission had made some representations about Zafir Tarik Ali being accused without sufficient evidence. At this time the Australians were campaigning on the absence of the rule of law in Fiji. Members of the Executive and the judiciary at this time strongly denied this. The members of the judiciary strongly resented this. Many of the Executive and some of the judiciary with Australian connections had been personally humiliated since the end of 2006. All because they supported the removal from power of a corrupt undemocratic racist

regime which through extractive policies was ruining Fiji.

41. The basic facts of the death of James Nair on 4<sup>th</sup> January 2010 I take from the summary in my ruling of 10<sup>th</sup> September 2010. I did not at that time have the full details that are in the Record for the purposes of the full appeal.

*“3. The facts concerned the early morning of Monday 3<sup>rd</sup> January of 2010. At about 2.00 a.m. there was a burglary at the home of Zafir Ali and Taimur Ali. The house is situated in the countryside at Bau Road Nausori.*

*4. Five family members got into a double cabin truck with a large uncovered area at the back for transporting goods. This is known as “the back tray”. Their object was to look for anyone who might be suspected in respect of the burglary.*

*5. James Shankar Nair was well known to the applicants as his family lived close by. At Nadali cemetery the five in the truck found James Nair around 3.00 a.m. He agreed to accept a lift and jumped into the back tray. Later the five decided to take James Nair as a suspect to Nausori police station. Shortly afterwards James Nair parted company with the back tray of the vehicle and was later found dead at the side of the road.*

*6. I am told that the medical evidence was less than satisfactory. It seems that James Nair died as a result of single fracture of the skull.”*

42. The matter came before the Court of Appeal on 25<sup>th</sup> February 2011. I presided sitting with Daniel Goundar J A and Paul Madigan J A. Mr G Reynolds QC from Australia represented the applicants. The prosecutor who I later strongly criticized in my judgment of 1<sup>st</sup> April 2011, Ms Jojjana Cokanasiga had by 25<sup>th</sup> February 2011 resigned from DPP's office. Indeed, the DPP who had instructed or approved her actions in June and July 2010 Mr Aca Rayawa had been dismissed by the Attorney General and replaced by a prosecutor from Sri Lanka

Ms Ayesha Jinasena.

43. On the hearing of the appeals the judges read what is necessary beforehand to conduct a fair hearing. Then the justice whose job it is to write a draft judgment studies the record in minute detail. At the hearing the advocates stuck to two points. One was the absence of any evidence on two points that had to be proved against the four accused. This was in effect the absence of “*a smoking gun*” which Anthony Gates C J had been at pains to tell me about at an earlier time. The other point was that the pathologist's evidence was suspect, because six months later after being approached by the prosecutor, he had resiled from his post mortem report which had wholly supported that death resulted from James Nair's decision to jump from a vehicle moving at between 50 and 65 mph. Mr Reynolds QC did not need to go into the unfairness of the trial and the detail of the changes in the pathologist's evidence. He knew that he had more than enough evidence to obtain an acquittal on appeal with the two points mentioned above. Ms Nanise Ratakele for the State simply made points about circumstantial evidence which in context were wholly unconvincing in the eyes of all members of the Court.

44. It took me more than a month of poring over the record, thinking about the case and writing and re-writing my intended judgment. I decided to expose fully the change in the charge without new evidence from manslaughter to murder. I was troubled by the strong evidence pointing to a conspiracy to prevent the course of justice by use of perjured evidence from the pathologist. It is quite impossible to imagine the facts relating to this evidence ever arising in England, Hong Kong, Australia and New Zealand. But if the impossible happened and a judge in these common law jurisdictions came across the matter it would be referred to the DPP for investigation and (depending on the outcome of the investigation) for prosecution. My decision was to steer clear of



such terms of "perjury" and "perversion of the course of justice". On the other hand I wrote 24 paragraphs which are paragraph 114 to 137 inclusive within my judgment to answer the following question:

**"What weight or credibility should have been given to Dr Ponnu Swamy Goundar's evidence at trial denying the material facts in his first report and stating that the only cause of death was head injuries?"**

I concluded that no weight at all could be given to pathologist Goundar's evidence at trial. Also that the important system of post mortems which requires complete integrity for the rule of law, had in Fiji no integrity at all. While I did not express suspicion of criminality, I supplied material from which informed observers might draw their own conclusions.

45. The procedures used by Ms Cokanasiga which were unfair and amounted to trial by intended ambush, I fully set out. The reason why she employed these tactics was to give pathologist Goundar's evidence at trial a better chance of success with the assessors.

46. I also exposed Ms Cokanasiga's incompetence in effecting her scheme (at least on appeal) by signing a formal admission that "cause of death was a ruptured aorta as a consequence of motor vehicle accident". By section 135 of the Criminal Procedure Decree an admission "shall be as against the (the party making the admission) **conclusive evidence of the fact admitted.**"

47. Particularly in relation to Acting President John Byrne's alleged "loose cannon" decisions resulting in his removal in October 2010, I had said in discussions with Anthony Gates C J that I was, and always had been, "a safe pair of hands". Therefore, with his agreement I submitted my final draft judgment to him for his advice. Advice, that is on the appropriate wording for an objective e judicial officer. Neither he nor I expected any comment on decisions of law or fact. But

I had discovered that Fiji was from time to time an irrational and volatile place. Therefore, how to express criticism that had to be made was an important matter.

48. I stress that I only used Anthony Gates C J as a filter for possibly unwise comments on three occasions where I felt that, although my comments would be acceptable elsewhere in the world, I had a “gut” feeling that there might be sensitivities of which I as a newcomer would be unaware, in Fiji. I asked for this advice. The idea that I resented this process in any way is quite untrue. Anyone who is cautious and not arrogant would have begged for this advice in these circumstances. I wanted the judgment in Zafir Tarik Ali to be seen as thorough and well researched and if anything understated, rather than over stated. I wished to appear to be “a safe pair of hands”. I wished to serve for a long time in my office of Resident Justice of Appeal and to settle in Fiji.

49. Anthony Gates C J ran his red pencil through a number of passages in my draft. Some of them related to the behavior, as shown by the Record, of the trial judge Justice Priyantha Fernando whom I said had been dominated by Ms Cokanasiga. I had pointed out a number of mistakes in the handling of the trial.

50. Having discussed it with Anthony Gates C J, I deleted all the comments highlighted by him. I also rewrote a number of passages in a “more judicial” tone. I then sent the new version back to Anthony Gates C J. He did not suggest further changes.

51. Paul Madigan JA in his judgment in the case said:

*“168. It is quite obvious from the facts of the case as set out in William Marshall JA’s judgment in paragraphs 20 to 28 inclusive 36 and 37, that there was absolutely not one iota of evidence to support a charge of manslaughter, let*

alone murder.....

170. *There being no unlawful act in evidence, nor any real circumstances which would even suggest an act, the learned trial judge should never have allowed the case to proceed at the end of the prosecution case.*

171. *The provenance of the "re-thought" spurious post mortem report is dishonourable. It does no credit to the Pathologist who was "persuaded" to change his reasons for the cause of death, and discount falling from a moving vehicle as a possible cause of death. The new cause of death being from multiple fractures of the skull could not possibly have been missed at the original autopsy.*

172. *I must allow the criticism of the conduct of the prosecution to a large degree, but the responsibility cannot be allowed to rest on her shoulders alone. Fault can be laid at the doors of the defence counsel, the pathologist, the judge and the then DPP.*

173. *This case can be seen perhaps as the nadir of the exercise of a DPP's discretion to prosecute.*

52. The judgments are at Document No. 17. Mine was the lead judgment. They were delivered on Friday 1<sup>st</sup> April 2011. I set out the importance of the rule of law in the opening passages.

*"1. In this society the rule of law is of vital importance. It is acknowledged by the executive even in this interim period when there is no elected or appointed legislature. Nowhere is it more important than in the criminal law.*

*2. As Lord Reading L.C.J. of England said in 1915 in the case of **Lee Kun v. R** Crim. A.R. 293 at 300, said:*

*"...the trial of a person for a criminal offence is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the*

*administration of the criminal law are matters which concern the State. Every citizen has an interest in seeing that persons are not convicted of crimes and do not forfeit life or liberty except when tried under the safeguards so carefully provided by the law."*

*3. Now the three groups of citizens who have the greatest burden in applying the safeguards and maintaining the rule of law in criminal cases are the police who investigate crime, the prosecution service under the Director of Public Prosecutions who have the duty of prosecuting criminal cases in the courts of Fiji, and finally, the judiciary particularly in the High Court. The High Court Judges, who are assisted on the facts by the opinion of the assessors, must apply the rules relating to procedure to be followed at criminal trials with integrity and meticulously, and make all the rulings necessary by applying principles of law without fear or favour in respect of either prosecutor or counsel for the defence. They have the burden of ensuring a fair trial in accordance with the rule of law. It is possible for defence lawyers to do things that undermine the rule of law. However the defence counsel in this case in the Court below acted throughout to uphold the rule of law. He conducted himself in a manner that is beyond reproach.*

*4. This case at one level is about four men of good character who together with a fifth (also of good character) went in search of a person who had broken, entered and stolen from one of their houses in the middle of the night. But it is at another level an enquiry into the conduct of a prosecutor who intentionally breached fundamental rules vital to the upholding of the rule of law in criminal cases. It is also about having a post mortem system of integrity.*

*5. The police in this case, as they do in every case with very few exceptions, performed to a high standard. Their investigation was objective, fair and, within the parameters of their resources, left no stone unturned. They were indeed*

ministers of justice upholding the rule of law.

6. Prosecution services under the DPP are usually carried out to a high standard under the DPP. I have considered many appeals and read many files in criminal cases. In respect of prosecutors I have always found that devotion to duty, to fairness and to the rule of law in criminal cases is exemplary. Most unusually there are criticisms of the prosecutor who conducted the case for the State in the Court below. However it is an isolated and unique case; an exceptional case like this does not cause any loss of public confidence in the conduct of prosecutors. Since the events discussed in this appeal, a new DPP has been appointed. Her team is not in any way responsible for what took place in this case...

9. Since (the common law that requires the prosecutor to conduct himself as a minister of justice) is of the first importance I also cite the modern view upon the same matter. I take it from Blackstone 2011 Edition paragraph D15.3 at pages 1702 – 3. The recommendations of the Farquharson Committee on the role of prosecuting counsel, were published in Counsel, Trinity 1986. I set out the paragraph:

“D15.3 Ministers of Justice in **Puddick** (1865( SF & F497, Crompton J said (at p. 499) that prosecution counsel 'are to regard themselves as ministers of justice, and not to struggle for a conviction' (see also per Avory J in **Banks** [1916] 2 DB 621 at p.623. Some of the implications this has on the prosecutor's role are identified in the introductory paragraphs of the Farquharson report:

There is no doubt that the obligations of prosecution counsel are different from those of counsel instructed for the defence in a criminal case or of counsel instructed in civil matters. His duties are wider both to the court and to the public at large. Furthermore, having regard to his duty to present the case for the prosecution fairly to the jury, he has a greater independence, of

those instructing him than that enjoyed by other counsel. It is well known to every practitioner that counsel for the prosecution must conduct his case moderately, albeit firmly. He must not strive unfairly to obtain a conviction; he must not press his case beyond the limits which the evidence permits; he must not invite the jury to convict on evidence which in his own judgment no longer sustains the charge laid in the indictment. If the evidence of a witness is undermined or severely blemished in the course of cross-examination, prosecution counsel must not present him to the jury as worthy of a credibility he no longer enjoys.... Great responsibility is placed upon prosecution counsel and although his description as a 'minister of justice' may sound pompous to modern ears it accurately describes the way in which he should discharge his function.

In **Gonez** [1999] All ER (D) 674, the Court of Appeal endorsed the description of prosecuting counsel as a minister of justice, stating that it was incumbent on him not to be betrayed by personal feelings, not to excite emotions or to inflame the minds of the jury, and not to make comments which could reasonably be construed as racist and bigoted. He was to be clinical and dispassionate." ....

.....11. Before leaving the importance of upholding the rule of law in criminal cases, it is the case that all judicial officers swear an oath "to serve the people of Fiji". Something similar may apply in respect of prosecuting counsel and to police officers. The words of the oath or affirmation may be different but the meaning must be the same. The police investigator serves the rule of law and the people of Fiji if he or she investigates thoroughly but nonetheless fairly and correctly in respect of gathering evidence, in respect of interrogating suspects and in respect of charging accused persons.

12. The public prosecutor serves the rule of law and the people of Fiji, if he or she observes the rules and does not strive to obtain convictions on a number of unfair and unlawful practices such as trying to get new and inconsistent evidence admitted into evidence against the accused. If the prosecutor does that without giving notice to the Court and the defence counsel who are ambushed and taken by surprise, it is worse. If the Court and the defence are

*intentionally mislead that makes it much worse.*

*13. The judge of the High Court serves the rule of law and the people of Fiji if aware of all the rules of law he or she applies them and achieves a fair trial.*

*14. The appeal judges have to look at miscarriage of justice both under the Court of Appeal Act and in terms of maintaining the rule of law in criminal cases. If there is an institutional failure as there is in this case in respect of the integrity of the post mortem system there may be a need to invite the executive to take steps to remedy the situation.”*

53. The substantive judgment in the appeal of Zafir Tarik Ali, Taimur Ali, Tahir Ali and Chandlesh Ganesh is Document No. 17. At the time of delivering this judgment, I believed that the Attorney General did not interfere in any way with the independence of the judiciary. If that was so, it was inconceivable that the Attorney General would interfere with the evidence in pending criminal cases in order to ensure the conviction of innocent citizens of Fiji of the crime of murder. So far as I was concerned on 1<sup>st</sup> April 2010, it was obvious that there had been a decision to frame Zafir Tarik Ali and others for murder. But as to who did it and what the motive was, it was a complete mystery to me. It could not be the Attorney General. After all, Anthony Gates C J had told me on 25<sup>th</sup> November 2009 that the executive would not interfere with the independence of the Judiciary and would uphold the rule of law. After all, I had written in effect to the Attorney General on 22<sup>nd</sup> March 2010:

*“I know that the ...Administration is committed to the rule of law in Fiji which at present means the appointment of judicial personnel who are well qualified men and women of integrity, competence, experience and impartiality.”*

The only response in March 2010 to this from the Attorney General whom, in the same letter I offered to meet, was a limited unblocking of his attempt to prevent my appointment. By 1<sup>st</sup> April 2011 I had only been in Fiji a few months. I did not know at the time of delivering this judgment the background that I write in this petition. Anthony Gates C J and Paul Madigan J A at that time certainly believed the administration was upholding the rule of law and judicial integrity. I certainly believed this as well. That is why in the passages above cited from my judgment in Zafir Tarik Ali and others, I commented extensively on the rule of law but said nothing about the independence of the judiciary.

54. The reaction to the Court of Appeal judgment was considerable. Surprisingly there was little in the Fiji Sun. But the Fiji Times had articles with photos quoting in one of them, Tahir Ali and in another Chandlesh Ganesh. There was also an editorial under the by-line of Fred Wesley. In the attached Bundle of documents Document No. 18 is "*Four Walk Free*": a report in the Fiji Times of (probably) 2<sup>nd</sup> April 2011 of the Zafir Ali and others appeal judgment. Document 19 is an article from the Fiji Times of Sunday 3<sup>rd</sup> April 2011 headed "*Ali says law is still alive, thanks judges.*" Document No. 20 is another article in the Fiji Times of Sunday 3<sup>rd</sup> April 2011 interviewing Tahir Ali headed "*I've lost out*": "*Nine months on Ali starts from scratch*". Document No. 21 also from the Fiji Times of Sunday 3<sup>rd</sup> April is headed "*Cry for freedom*" and features an interview with Chandlesh Ganesh. Document No. 22 entitled "*a fair deal*" is the Fiji Times lead editorial of Sunday 3<sup>rd</sup> April 2011 under the by-line of Fred Wesley.

55. I will quote from the report from the Fiji Times on 3<sup>rd</sup> April 2011. It is about Tahir Ali and his comments after his release. Tahir Ali is a grandfather aged 59. He is of good character and is widely respected in the Nausori Muslim community. After school in Fiji he went to India and graduated with a degree in politics from Punjab University. He then opted for a career as a farmer in Fiji. The article



under the bye-line of Avinesh Gopal says:

*“Ali says law is still alive, thanks judges*

*TAHIR Ali, believes that the law is still well and alive in the country to make and keep people happy, as illustrated in the Court of Appeal judgment.*

*“I am happy that the law is still there for the people and I am thankful to the Judges who heard our appeal in the Court of Appeal.:*

*“But there are some loopholes and some people are yet to be blamed for our wrongful conviction and sentencing as stated by the Court of Appeal judges.”*

*“Those in higher positions should look into the matter and make recommendations to rectify things so that innocent people don't suffer by going to prison for something they did not do” Mr Ali said.*

*Mr Ali, who has been a livestock farmer since his young days, said while in prison, his wife had to sell his cattle and goats because of financial constraints.*

*“I have a two year old granddaughter and we have to buy powdered milk for her now because my wife had to sell the cows I had for our daily supply of milk.”*

*“I don't have any livestock left and I don't even have any money because the four of us paid close to \$130,000 to our lawyers for the trial and the appeal” he said.*

*“When we were charged and later bailed by the magistrate's court, we were ordered not to live in Nausori as one of the conditions of our bail.”*

*“As a result, the four of us had to rent a flat in Laucala Beach Estate and we paid \$600 rent every month and expenses were also incurred on food.”*

*Mr Ali said he, his two nephews and Mr Ganesh rented for about six months before they were sentenced to life imprisonment, which shattered their lives.*

56. The editorial published by the Fiji Times on 3<sup>rd</sup> April 2011 said:

*“Justice at last*

*CHANDLESH Ganesh said he shed tears every day over the past nine months he spent behind bars.*

*There was obviously a touch of frustration and sense of helplessness, emotional factors he had to carry with him. But in the face of that mentally draining episode in his life, he prayed for justice, and got it, nine months later.*

*Mr Ganesh was one of four men who were wrongfully convicted for the murder of James Nair in the early hours of January 4, 2010.*

*The Fiji Court of Appeal found the men had not murdered anyone who had died as a result of a severed aorta, caused by him falling or jumping off the tray of the vehicle in which he was travelling.*

*All four were described as men of good character by the Appeals Court last week.*

*Mr Ganesh said his family had a hard time without him. His children, his mother, and his wife all suffered in the end.*

*Mr Ganesh, 35, was reunited with his family after the court ordered that the appeals of Zafir Tarik Ali, Taimur Ali, Zahir Ali and Mr Ganesh against conviction for murder be allowed.*

*They were acquitted of the charge of murder and their convictions set aside and sentences quashed.*

*It effectively ended months of anguish for the four men and drove through a message that declares our justice system is fair. There was justice in the end. Such incidents should give us hope that there is a system in place to protect our rights.*

*The law is supposed to shape our political aspirations, our economic hopes and help shape the society we live in. They may even be seen as a social mediator of relations between people.*

*All four men knew they were innocent.*

*They prayed that justice would be served. Their last hope was the Court of Appeal. Such is life. When all hope appeared lost, the long arm of the law stood for what was right in the end. Four men are now back with their families, thanks to our justice system."*

57. In the May 2011 edition of the magazine "Mai LIFE" the leading feature was a six page spread about the case with colour photos and maps. Ms Cokanasiga

was quoted as saying:

*"Whilst I do not dispute their finding with regards to the case and evidence, their comments about me were unfair and has tarnished my reputation as a professional."*

The only response to that is that every fact underlying the criticism is taken from the Record of the proceedings in the High Court trial. People who choose a public stage on which to perform must expect criticism if the facts of their public conduct show that they have caused a miscarriage of justice or otherwise deserved censure. The common law – and I believe the ordinary people of Fiji – hate and abhor miscarriage of justice. That is why when such occurs it is the duty of the judges to explain what went wrong. The object of explaining is to ensure, as far as possible, that it will not happen again.

58. In the Mai LIFE article Tahir Ali is quoted as saying:

*"Somebody has to take the blame but not us innocent people," says Tahir. "It happened to us but it shouldn't happen to anybody. If it had happened mistakenly that's different, but to frame a person and fabricate evidence, that's not done," says the well-spoken Ali, whose New Zealand-based mum in her 90s visited him twice while he was in prison. "If we had done even one per cent wrong our families would have left us to bear the consequences."*

At Document No. 23 in the accompanying Bundle is the six page feature from Mai LIFE of May 2011. At Document No. 24 is the Editorial from that issue of Mai LIFE commenting on the Zafir Tarik Ali and others appeal case.

59. Before leaving Zafir Tarik Ali as I recorded in the judgment, I asked the DPP Ms Ayesha Jinasena before giving judgment on 1<sup>st</sup> April 2011 that if there was an acquittal on appeal, was the DPP going to take the case to the Supreme Court.

The only reason for this is that those acquitted should be on bail until the matter is finalised. For one thing if an Australian resident returns to Australia, there is no extradition from Australia to Fiji. I put no pressure at all on Ms Jinasena. The first answer was unclear so I wrote again. This time the answer was clear. There would in any event be no prosecution appeal. Shortly afterwards on Friday 15<sup>th</sup> April 2011, I was invited to the prosecution headquarters to lecture prosecutors on the legal framework for criminal appeals in the Court of Appeal Act and its interpretation. A few weeks later I and Justice Ariam Brito assisted a prosecutor's training session at the Holiday Inn run by Madam Justice Shameem. Ms Jinasena told me that she had taken the decision not to appeal to the Supreme Court in the Zafir Tarik Ali case, because on reading the papers herself she had concluded that there was no case to answer on manslaughter or murder. I have no doubt that Mrs Jinasena would not be a party to unfair prosecution in order to obtain a conviction and would certainly not agree to framing suspects because the Attorney General wished a conviction. I also know that she was a competent assessor of cases. I was not surprised in December 2011 when I heard that she had been dismissed by the Attorney General. The idea that one must encourage and retain public servants who wish to serve the public of Fiji with competence and integrity has no part in the Attorney General's mindset. You do what the Attorney General wants whether it is lawful or not. If you refuse you are dismissed. Or even if you do it, but fail to achieve the required result, you are dismissed. Perhaps the Attorney General asked Mrs Jinasena to reinstate Ms Jojjana Cokanasiga and she refused. Ms Jinasena was replaced by the Solicitor General Christopher Pryde who has never practiced criminal law. Perhaps his role in my recruitment has caused his demotion. Under his leadership Ms Cokanasiga has been re-employed.

**The Attorney General tries to defame me in my profession of judge by false**

## evidence

60. On Friday 15<sup>th</sup> April 2011, I returned from lecturing prosecutors at Gunu House to an urgent request that I immediately go to the Chief Justice's Chambers. I did so and was astonished to find that the Attorney General was accusing me of improper behavior by showing enthusiastic friendliness and partiality to the lawyers, family and friends of Mahendra Motibhai Patel including Sir Moti Tikaram. The place was at the Holiday Inn. On 14<sup>th</sup> April 2011 Mahendra Motibhai Patel had been imprisoned for one year on one count of abuse of office. The allegation against me was vague and it was not clear on what date the alleged improper conduct was said to have taken place. I knew I had done no such thing as had been alleged.

61. Over the weekend my wife and I went over where we were for lunch in the week 11<sup>th</sup> April 2011 to 15<sup>th</sup> April 2011. I made a statement about our movements. It is Document No. 25 and it is dated 18<sup>th</sup> April 2011. I and my wife signed and countersigned the document. The Chief Justice never came back to me to say that the allegation, as set out by me in the statement was other than correct. Nor did he call me back for further discussion. I still did not connect the false allegation with my judgment in Zafir Tarik Ali and others because I believed that the Attorney General genuinely supported the rule of law and the independence of the judiciary and would never have framed innocent Fijian citizens for murder. But I also knew that if the Attorney General had read every ruling and judgment that I had delivered between 16<sup>th</sup> July 2010, when I was appointed, until 1<sup>st</sup> April 2011 there was not anything of which he could possibly disapprove. I had been "a safe pair of hands" and had not given "over the top" decisions of the kind the Attorney General had disapproved John Byrne of giving. This can be checked by looking at all my judgments and rulings between 16<sup>th</sup> July 2010 and 1<sup>st</sup> April 2011. These are fully

included in Document No. 26 and Document No. 27 which are CDs containing respectively, all my judgments up to 19<sup>th</sup> April 2012 and all my rulings up to the same date. Each item is marked with the date of the delivery by me of the judgment or ruling. In my paragraph 12 of my statement of 18<sup>th</sup> April 2011 I had said:

*“12. Since this is a false accusation designed to compromise my reputation, please ask the Attorney General to disclose the identity of his informer so that I can take under advisement whether to take proceedings.”*

I don't think I was surprised when neither the Chief Justice nor the Attorney General came back to me on this.

62. Because of the short sentences of 9 months and 12 months handed down to Peni Mau and Mahendra Patel, I was of the view that the appeal must be heard and judgment delivered before their prison sentences expired. I researched this and explained it in my ruling of 12<sup>th</sup> May 2012. This Ruling is Document No. 28 My orders were :-

*“I conclude this ruling by ordering and directing as follows:*

*(1) Leave to appeal against conviction and sentence is granted to Mahendra Motibhai Patel.*

*(2) Leave to appeal against conviction and sentence is granted to Tevita Peni Mau.*

*(3) Bail pending appeal is refused in respect of Mahendra Motibhai Patel.*

*(4) Bail pending appeal is refused in respect of Tevita Peni Mau.*

*(5) A direction that the Record be filed as soon as possible and before the call over for the Court of Appeal session gazette to take place between 30<sup>th</sup> August and 30<sup>th</sup> September 2011.*

*(6) A direction that if there is irremediable delay in obtaining some part of the*

record such part by included in a Supplementary Record when it becomes available.

(7) *A direction that these appeals be heard in the Court of Appeal session to be held between 30<sup>th</sup> August and 30<sup>th</sup> September 2011."*

63. The conviction in the High Court of Mahendra Patel was on 14<sup>th</sup> April 2011. As soon as the appeals were lodged I ordered an effective hearing date for the leave applications of 2<sup>nd</sup> May 2011. On 30<sup>th</sup> April 2011 both FICAC and solicitors for the appellants were informed that this was not for a mention but would be the effective hearing in respect of bail pending appeal and in respect of leave to appeal so that their written submissions should be ready for 2<sup>nd</sup> May 2011. But Counsel for FICAC, Mr M Tennakoon appeared on 2<sup>nd</sup> May 2011 claiming that he was not ready because he thought it was for mention only. He did not dispute that the notice of an effective hearing had been given on 30<sup>th</sup> April 2011. So I did what I have done before and indeed what any judge will do when it seems that the tactics of one side are simply aimed at delaying justice. I gave leave for Mr Tennakoon to file full written submissions in reply to the oral and written submission of Mr G Reynolds QC for Mr Patel. FICAC took this opportunity in full. I did not consider the issues until written submissions were before me. I took full account of the written arguments of Counsel for FICAC.

64. When there was no application for my recusal on 2<sup>nd</sup> May 2011 I briefly thought that the matter raised by the Chief Justice on 15<sup>th</sup> April 2011 had been dropped by the Attorney General because he accepted my denial and explanation. Much more likely there was a factual problem. The witness for the Attorney General was one Kolinio Waqa who is the Attorney General's bodyguard. As I stated in my signed statement of 18<sup>th</sup> April 2011 the allegation passed on to me by the Chief Justice on 15<sup>th</sup> April 2011 (never amended) was "*that Patel and Mau were present at the Holiday Inn at lunchtime.*" But Kolinio Waqa could not

have seen Patel on 14<sup>th</sup> April 2011 at lunch time because he and Peni Mau had been taken to prison when the sentencing by Justice Goundar ended before lunch. See the report in Mai LIFE for May 2011 which shows a photograph of Mr Patel being removed in handcuffs on the 14<sup>th</sup> April 2011. This is Document No.31

65. I had finished my 34 paragraph ruling and signed off on it when I heard from the Registry that FICAC were now applying for my recusal from deciding these applications. The time to make such an application was at the latest at the commencement of the hearing on 2<sup>nd</sup> May 2011. I gave my rulings on 12<sup>th</sup> May 2011 and no party raised or mentioned the recusal application at the hearing.

66. My ruling of 12<sup>th</sup> May 2011 speaks for itself. It is clear that I decided the issues without fear or favour to any party.

67. The day before my ruling caused me some surprise when I read the newspapers. On the 11<sup>th</sup> May 2011, FICAC at the behest of the Attorney General filed a motion that I recuse myself from the ruling in the Mahendra Patel and Peni Mau applications heard by me on 2<sup>nd</sup> May 2011. Also from any later participation in the same matter. FICAC on the 11<sup>th</sup> May 2011 issued a press release about this. The Fiji Times ran an article about this headed "*Judge accused of bias*". It reads:

*"Fiji Times 12<sup>th</sup> May 2011*

*NEWS*

***Judge accused of bias*** by Shalveen Chand

*AN application has been made by the Fiji Independent Commission Against Corruption for the recusal of Justice William Marshall from the appeal case of former Post Fiji chairman Mahendra Patel and former managing director Pani Mau.*

*The application was made yesterday on the eve of the ruling on the bail*



*pending application made by Patel and Mau's lawyers.*

*Justice Marshall is the current resident Appeals Court judge who has been presiding over most single judge appeal cases.*

*FICAC confirmed it was pursuing the application on the basis that it had received credible information to substantiate alleged reasonable apprehension of bias. The application seeks to have Justice Marshall abstain from participation in the bail application pending appeal, the appeal hearing and any future matters arising out of the trial of FICAC against Mau and Patel.*

*Mau's lawyer Devanesh Sharma said he was unaware of the application as he had not been served with the documents by yesterday afternoon. He said he was awaiting the ruling on the bail pending appeal to be delivered this morning. Patel was sentenced to 12 months in jail while Mau was given a nine month jail term."*

This article is produced in the attached bundle of documents as Document No. 29.

68. Recusal applications by defendants in criminal cases are commonplace. Also parties in civil actions or matters sometimes make such applications. But I have never, in 43 years practice as a barrister, come across a recusal application by the Attorney General, who is "The State" when all decisions of the State to prosecute are made, and who is the top legal adviser to the Government and Cabinet. The reason is that as well as the judiciary being independent of the Executive there is comity between the judiciary and the Executive to ensure that the State runs cohesively. Either the Executive decides to move for a judge's impeachment or it allows the judge to continue to administer the cases assigned to him. It does not make recusal applications in order to "forum shop" or for any other reason. On 11<sup>th</sup> September 2011 three members of the Court of

Appeal found that in effect there was a conspiracy between the Attorney General and his bodyguard, that the bodyguard would falsely claim to have observed an event involving William Marshall RJA which made William Marshall JA unfit to sit on a particular appeal case and by logical extension unfit to sit on any appeal cases. Clearly the Attorney General instructed Kolinio Waqa what to do and what to say. So it was a conspiracy of these two persons.

69. In the absence of an impeachment procedure, if the allegation was true the Attorney General would on 15<sup>th</sup> April 2011 have approached the Chief Justice with a view to the Chief Justice giving William Marshall RJA one month's notice and suspending him from further duties. But Anthony Gates CJ would in this case do no such thing. For one thing he knew after many years how the Attorney General operated. For another, having immediately investigated the matter with me and received the evidence in reply from me supported by that of my wife, he would decide that the allegation was false. A third reason, that having been a victim of a conspiracy to give false evidence regarding his own conduct as a judge in the Ratu Vakalalabure mutiny case, he would realize that this was simply improper interference with judicial independence. There is a fourth reason. At this time Anthony Gates C J, still believed he was running an independent judiciary. He wished to continue doing so.

70. But if rebuffed by the Chief Justice, any Attorney General in any other mainstream common law jurisdiction would have backed off. He would have backed off in order to preserve comity and to avoid exposing to the public a Fijian State in which the Executive was trying to undermine the judiciary by defaming and sidelining the Resident Justice of Appeal who at this time was the most senior judge after the Chief Justice.

71. As can be seen from paragraph 12 of my signed statement of 18<sup>th</sup> April 2011, I considered suing the Attorney General for defamation. The newspaper article of 11<sup>th</sup> April 2011 quoted in paragraph 71 is serious defamation aimed at influencing the Fijian public against my sitting on cases. I did not take proceedings because I hoped that I could continue in Fiji as a judge free to act with integrity in applying the rule of law and upholding the independence of the judiciary. But if I had sued, I know the Attorney General, if he did not pass a decree to terminate the litigation, would have ensured that the judge hearing the case would rule against me.

72. On 5<sup>th</sup> August 2011, after the Appeal hearing had been fixed at call over for 30<sup>th</sup> August 2011 the registry received a Notice of Motion dated 4<sup>th</sup> August 2011 from FICAC together with supporting affidavits. These are Documents No. 32, 33, 34 and 35.

73. The impossibility of my “*glad handing*” Mr Patel or Mr Mau in the Holiday Inn at lunch time on 14<sup>th</sup> April 2011 had now been recognized. So Kolinio Waqa came up with a new untrue allegation. Now I was said to have been shaking hands with one of the gentlemen gathered around Mrs Mahenda Motibhai Patel at the bar lounge. I was also said to have been observed taking to Mrs Mahendra Motibhai Patel at the bar lounge.

74. In “*Counsel*” of May 2012 there was an article by Sir Stephen Sedley, a distinguished recently retired judge of the Court of Appeal in England headed “*When should a judge not be a judge?*” Its conclusions about recusal hearings relevant to the recusal application of FICAC are summarized in my affidavit of August 2011 as follows:

*“Sir Stephen’s advice places emphasis upon:*

1) *The need to avoid forum shopping; Judges should be slow to recuse themselves when there is no cause or insufficient cause.*

2) *The judge against whom the accusation is made should not hear the application because he must not be a judge of fact in his own cause.*

3) *On appeals the judge under attack should let the other members decide the facts : if they advise him to withdraw he should do so."*

I produce the article by Sir Stephen Sedley as Document No. 36.

75. I decided that I would follow Sir Stephen Sedley's advice and would hear the Mau and Patel appeal unless my appeal panel colleagues, having heard the recusal application in my absence, advised that I should recuse myself. But first I discussed the advice of Sir Stephen and my proposed decision with Anthony Gates CJ. He was supportive of my intended course of action. He agreed that the advice of Sir Stephen Sedley was authoritative and should be followed.

76. Anthony Gates C J had been the victim of a conspiracy that substantially damaged his reputation in the mutiny appeal of Ratu Inoke Takiveikata. I have discussed this at paragraph 14 above. But the judges were there intent in doing what the Qarase government desired. It was a political decision. The judiciary were happy to be undermined by the Qarase government which would support them if they did what that government wanted. Justice Gates' reputation was sacrificed to achieve that result. It is likely that in this present case Anthony Gates C J saw clearly that if I did not resist successfully this false accusation, my ability to serve with integrity and uphold the rule of law and the independence of the judiciary from executive interference would become a dead letter. I would be recused from all important cases in the future.

77. The callover for next session of the Court of Appeal was held on 13<sup>th</sup> July 2011 and the usual directions were given with regard to written cases for the substantive appeal.

78. Since it was clear that FICAC intended to make a recusal application, I issued Directions, a copy of which is Document No. 30 on 21<sup>st</sup> July 2011. These allowed for a hearing of the recusal application on the first day of the appeal on 30<sup>th</sup> August 2011. Direction No. 10 allowed all persons in a position to give relevant factual evidence to do so within 7 days of receiving the FICAC application and evidence.

79. FICAC decided to complain about a routine decision to extend time for Mr Patel's Counsel in the substantive appeal. I held a hearing and issued amended directions. This episode was put forward as evidence of my apparent bias. It is dealt with fully in my affidavit of 11<sup>th</sup> August 2011 (Document No. 37) at paragraph 22. At the end of the hearing Counsel for FICAC conceded that my revised directions were fair.

80. On 11<sup>th</sup> August 2011 I and my wife, Mrs Aileen Janet Sinclair Marshall, swore affidavits in reply to the accusations. My wife gave evidence only about the incident on 14<sup>th</sup> April 2011. I dealt with that as well but then replied to all the other alleged instances of facts in the handling of the case said to evidence my apparent bias. My wife's affidavit is Document No. 38.

81. The next tactic by FICAC was an application dated 18<sup>th</sup> August 2011 that the affidavits of myself and my wife be struck out. It is Document No. 39. I directed a full court presided over by Justice Salesi Temo, the other members being Justice Ariam Brito-Mutunuyagam and myself be convened for 24<sup>th</sup> August 2011. The "*Ruling of the Full Court*" was a judgment of the Court. All three judges

agreed and it was delivered on the same day being 24<sup>th</sup> August 2011. A copy of the ruling refusing FICAC's application is Document No. 40. The ruling concluded with the following orders:

"12. Our order is:

(1) That the application by FICAC to strike out the factual affidavits of Justice William Marshall and Mrs A J S Marshall in the recusal application be refused.

(2) That the recusal application and then the substantive appeal will be heard as previously directed on 30<sup>th</sup> August 2011.

(3) Should there be further affidavits from any party or witness these will be admissible on the recusal application in the discretion of the Court."

82. On 25<sup>th</sup> August 2011 there was an important development. An affidavit made by the wife of Mahendra Motibhai Patel, Mrs Pratima Patel, was filed in the Registry. It is Document No. 41 in the bundle. It had been sworn on 23<sup>rd</sup> August 2011 so it is not clear whether the swearing of it was in response to the Court's order on 24<sup>th</sup> August 2011. Since it is short, I set it out in full. Paragraph 3 is here printed in bold by me in order to emphasise its significance.

**"AFFIDAVIT OF PRATIMA PATEL**

I, PRATIMA PATEL of Denarau Nadi in the Republic of Fiji, Domestic Duties make oath and say as follows:-

1. \_\_\_\_\_ I am the lawful wife of Mahendar Motibhai Patel, the Appellant in this Appeal.

2. \_\_\_\_\_ **DURING** the criminal trial of my husband in the High Court in this matter being the Suva High Court Criminal Action No. HAC089 of 2010 from 14<sup>th</sup> March to 6<sup>th</sup> April, 2011, I was staying at Holiday Inn at Suva with my husband but I did not attend any court proceedings.

**3. I did not meet or speak to Mr. Justice William Marshall on the 14<sup>th</sup> April, 2011 or at any other time. In fact I do not know Mr. Justice William Marshall at all and will not be able to recognize him.**

**SWORN etc."**

83. On the 30<sup>th</sup> August 2011 I sat as one of a four-man bench presided over by Salesi Temo J A to hear the substantive appeals. Immediately that it became clear that Mr Marasinghe for FICAC was going to move for my recusal, I withdrew. When Salesi Temo J A, Kankani Chitrasiri J A and A L Brito Mutunuyagam concluded their hearing on it, they conferred and unanimously came to the conclusion when they announced that:

*"Justice Marshall is at liberty to sit on the substantive appeal if he so desires."*

The Court also made the following orders on 30<sup>th</sup> August 2011:

*"(1) The recusal application referred to in the Notice of Motion dated 5<sup>th</sup> August 2011 filed by the Respondent FICAC is hereby refused.*

*(2) We make no order as to the costs of this application."*

The written "*Ruling on Application for Recusal*" was handed down on 11<sup>th</sup> September 2011. It is Document No. 42 in the bundle attached to this Petition.

84. It is to be noted that FICAC shied away from calling Private Kolinio Waqa from giving oral evidence and being cross-examined. Nor did FICAC apply for me, my wife and Pratima Patel to give oral evidence. No one could possibly believe that Waqa's evidence was other than what the Attorney General asked him to say. It also seems his evidence first time around of seeing me "*glad hand*"

everyone including Mahendra Patel, who was then in jail, had to be re-worked. That would be embarrassing. Kolinio Waqa had no credibility.

85. In finding that *"Kolinio Waqa has stated a falsehood as to the crucial point of the alleged incident"* it is useful to set out the relevant passages in full.

*"9. In the affidavit of Kolinio Waqa that was filed with the notice of motion by FICAC, he has stated that he, being a personal security officer to the Hon. Attorney General of Fiji who was attending a meeting, was present in the Holiday Inn Hotel on the 14<sup>th</sup> of April 2011. He also stated that he saw, a European gentleman who was supposed to have been seen by him in the CCTV, shaking hands with one of the gentlemen gathered around Mrs. Patel and was also taking to Mrs Mahendra Patel.*

*10. In the affidavit of Waqa, particularly in paragraph 24, he has stated that the events described in paragraphs 5, 6, 8, 9, 10, 11, 12, 13, 14, 15 and 19 can be positively confirmed through the CCTV footage. This statement in the said affidavit appears to be factually incorrect. In Paragraph 19 of the affidavit where he makes the most serious allegation against Justice Marshall, he had stated that he saw a European gentleman talking to Mrs. Mahendra Motibhai Patel. Nothing appears in the CCTV coverage as to Justice Marshall talking or shaking hands with anyone. Therefore, it is clear that the deponent to the said affidavit namely Kolinio Waqa has stated a falsehood as to the crucial point of the alleged incident.*

*11. Also, it is common knowledge to see many European gentlemen in white shirts carrying black coats in this hotel. Moreover, Kolinio Waqa has not seen Justice Marshall before. In those circumstances, I am not inclined to accept that Justice Marshall was talking to Mrs. Patel or shaking hand with anybody in*



*the hotel as referred to in the said Paragraph 19 of Waqa's affidavit, particularly in the absence of any supportive evidence.*

*12. Furthermore, His Lordship Justice Marshall and Mrs. Marshall have categorically denied that Justice Marshall had ever met Mr. Patel or his wife. Justice Marshall had further stated that he would have had no idea as to the identity of Mr. and Mrs. Patel.*

*13. Accordingly, when evaluating the evidence of Waqa on this important point as opposed to Justice Marshall, I prefer to accept what Justice Marshall and Mrs. Marshall have stated.”*

86. The ruling or judgment was the work of Kankani Chitrasiri J A. He was reluctant to accept any amendments to his draft. Salesi Temo J A wished to include a clear finding that Kilinio Waqa had given false evidence. But all he could persuade Kankani Chitrasiri to change in the draft was the conclusion in the final sentence of paragraph 10.

87. Although I did not know it at the time, since the first judges arrived from Sri Lanka in 2010, they have been directly pressured by the agent of the Attorney General in the Judiciary. Since her appointment as Chief Registrar, Mrs Irani Wakishta Arachchi has been that agent. Recently she has been assisted by a Deputy Registrar Mohammed Saneem who is a relation or otherwise closely connected with the Attorney General. Sri Lankans are told that they must do what the Attorney General would wish them to do in cases. That applies to appointed Fiji judges such as Justice Priyantha Fernando, or to Visiting Judges of Appeal from Sri Lanka, such as Kankani Chitrasiri. In August 2011 the Sri Lankan and the “other” judges such as Justice Salesi Temo were treated differently. Anthony Gates C J told “the others” and no one dared put them right, that the judges

were expected to act with integrity and not to do what the Executive wanted unless on the facts and the law and the merits the Executive should win the case.

88. Kankani Chitrasiri J A was a very difficult situation. Since my arrival in 2010 he was my friend and colleague on the Court of Appeal during the Gazetted sessions where he was one of (usually) two visiting judges. He would not wish to find that the Attorney General conspired with false evidence to falsely nullify the Resident Justice of Appeal's reputation, influence and integrity. He would not be invited back if he did that. On the other hand he probably was aware that I was being framed and accepted my evidence. He would also know, as the Attorney General's agents would know, that in this case neither Justice Salesi Temo nor Justice Ariam Brito were likely to find or pretend to find the Attorney General's evidence credible. So he decided to find for me without exposing in public the evidence that would convince every informed observer in Fiji that it was a fraudulent invented allegation on the part of the Attorney General and Kolinio Waqa. I refer to paragraph 3 of Mrs Pratima Patel's evidence set out in paragraph 75 above. Instead he made findings as if he was giving me the benefit of the doubt.

89. The Attorney General in fact committed the offence of misconduct in his public office in framing me as a judge who had no integrity and who would favour his friends rather than return a true verdict. When he made the allegation public through placing it in the newspapers, he was convinced that Kolinio Waqa's lies would be upheld. But Mrs Pratima Patel's evidence on 25<sup>th</sup> August 2011 changed any possibility of that. So the Attorney General got Kankani Chitrasiri J A to avoid mention of the most damning piece of evidence in the case. Instead, the ruling makes it appear that I was fortunate to be given the verdict on the facts by judges who were likely to favour a brother judge if they could

reasonably do so. Not that the Attorney General would ever decide to prosecute himself. But if he did he would fix the judges so that he would be acquitted. As soon as I heard the allegation on 15<sup>th</sup> April 2011 I considered a defamation action against the Attorney General's witness and the Attorney General. If I had taken such action I would have failed no matter how strong the evidence was in my favour. The action would have been referred to a High Court judge who could be relied upon to find for the Attorney General whatever the evidence.

90. I include as Documents No.43 and No. 44 the submissions of FICAC in the recusal hearing including their written reply. It shows that they were desperate in the hopeless points they took. But Mr Tennakoon and Mr Marasinghe were in a very hard place. They knew that if they did not do as required of them by the Attorney General they would be out of a job. And they knew the same would happen if they failed to obtain a result. Mr Tennakoon, I believe, was dismissed before the substantive appeal hearing. Mr Marasinghe went after the failure to have the court to advise me to recuse myself.

91. The Attorney General knew from all my previous judgments and rulings in criminal cases that I would find for the State in the appeal of Peni Mau and Mahendra Motibhai Patel. That is if the evidence clearly proved all the elements of the offences of abuse of public office. He was aware that the evidence was strong in favour of the State. The Attorney General controls FICAC and uses it to selectively prosecute those who he perceives to be his political enemies. He knew that neither the investigators nor the prosecutors had framed either Peni Mau or Mahendra Motibhai Patel. The invention of alleged misconduct on my part was not because he thought that I would allow these appeals because I was partial and friendly to Mahendra Patel. It was to negative my future in Fiji as a judge of integrity who would uphold the rule of law

in the face of Executive pressure that I should unjustifiably find for the Executive. I was a threat because of one judgment in Zafir Tarik Ali and others where I exposed a prosecutor's conspiracy to frame four innocent men for murder. I had not connected this to him as Attorney General. But I had come uncomfortably close to exposing facts that would lead others to that conclusion. In addition I had not asked myself, "*What would the Attorney General wish me to find in this case?*" and acted accordingly. I had to be neutralized as a judge of integrity. I was obviously not likely to be intimidated from applying the law with integrity by any representations that he might make to me. The Chief Justice was not likely to give me one month's notice. So I would be an impediment to his creation of a judiciary wholly pliant to the will of the Executive until my contract expired on 15<sup>th</sup> July 2012. When the conspiracy to prove me an unfit judge failed on 30<sup>th</sup> August 2011, I believed I was able to continue doing the right thing in the Appeal Court until the end of my contract.

92. Although Kankani Chitrasiri J A unfairly served the Attorney General's interest in his judgment, he was also disposed to protect my interests. So in the judgment he stressed that I should only sit, "*if I so desire*". This reflected his and the Chief Registrar's belief that I and all the judges should do what the Attorney General wants. I have little doubt that in the authoritarian democracy of Sri Lanka, it is accepted that if you wish a career as a judge you do what the executive requires of you. If you do not, you lose your job. So this persuasion was aimed at saving my job. But both in England and in Hong Kong and, at one time in Fiji, the rule of law and the independence of the judiciary from executive demands is sacrosanct. It is a breach of the judicial oath to do what the executive wants in order to save one's job. The Sri Lankans in Fiji do not understand this. To me it is a matter of not compromising my judicial integrity.

93. I recollect that the substantive hearing of the Peni Mau and Mahendra Patel appeal took place on Monday 2<sup>nd</sup> September 2011 and Tuesday 3<sup>rd</sup> September 2011. Although I was perched at the end of the bench as the fourth member, I found I had to lead on comment and had to suggest such decisions as arose on the hearing. I was the only judge of experience of this kind of offence. Indeed Justice Kankani Chitrasiri and Justice Ariam Brito are civil judges. Justice Salesi Temo had no previous experience of “*abuse of public office*” which at common law is “*misconduct in a public office*”. I ensured that all three parties were allowed to submit *in extenso*. Mr G Reynolds QC for Mr Mahendra Patel, after orating about a “*decisive*” point, would invite the Bench to retire and consider whether they should return and acquit Mr Patel without hearing the rest of the case. It fell to me on these occasions to patiently point out to Mr Reynolds QC the procedures necessary for a fair hearing. I ensured that all parties had a full hearing and a fair hearing. In what is analogous to hearing commercial crime cases, the short hearing time suitable to murder where the facts are simple, are inappropriate for cases where the factual matrix is complex.

94. The judgment of 71 pages in 183 paragraphs that I wrote took me six weeks to research and write. It is Document No. 45. A summary of it is Document No. 46. I never make up my mind until I have mastered the trial record in detail and researched the relevant law. When it came to the evidence there were a lot of documents which proved the facts as well as direct evidence. After consideration, I had no doubt that Mahendra Patel and Peni Mau were “*guilty*” as charged. Explaining and rewriting the law on misconduct and reconciling it with the Fiji Criminal Code offence of abuse of office was a major task. Then because the three assessors had given their unanimous opinion that Mahendra Patel was “*not guilty*” I had to examine the statutory framework for trials by High Court Judge with assessors and discuss the appeal statutory framework and the common law decisions in historical order as to criteria and rules as to the power

of the Court of Appeal to intervene when the judge decides to convict contrary to the opinion of the assessors. This took 80 paragraphs. At a judiciary dinner before Christmas 2011, as I have mentioned in paragraph 9 above, Madam Justice Shameem commended my judgment. I conclude this section by stating categorically that I did not favour FICAC or Mr Mahendra Patel in my decision in the appeal.

**Efforts to continue in Fiji if allowed to act independently and impartially; could my contract expiring on 15<sup>th</sup> July 2012 be renewed?**

95. Before Christmas 2011, I told Anthony Gates CJ that I wished to be given a new two year contract. I required an answer in January or February 2012 at the latest. Anthony Gates CJ said that because of the power of the Attorney General it seemed that even with his support I would not get a new contract. I said to him that he must make every effort on my behalf. I had followed his instructions and our informal agreement of 25<sup>th</sup> November 2009 to the letter. I also said that he should enlist Madam Justice Shameem's support in view of her genuine approval of my judgment in Peni Mau and Mahendra Motibhai Patel. I suggested inviting the Attorney General to a social event that I was planning if it meant there could possibly be a meeting of minds in respect of the future.

96. After Christmas 2011, when most judges are not in Fiji, I spoke again with Anthony Gates CJ and he now expressed confidence that my contract would be renewed. If as seems likely, he had communicated with the Attorney General before giving this answer, Anthony Gates CJ was acting in good faith. Events happened from within the judiciary that were orchestrated by Irani Wakishta Arachichi, who was the Attorney General's agent inside the judiciary from 11<sup>th</sup> May 2011 onwards.

97. These events commenced with indirect persuasion that I might see the error of my ways in resisting the will of the Attorney General. They moved on to removing my influence as de facto Acting President of the Court of Appeal over Visiting Justices of Appeal who, after June 2011, were always from Sri Lanka. The next stage was persuading a visiting justice to dissent from the judgments that I wrote in draft combined with persuading the third judge to outvote me on the outcome of the case. Finally pressure on the "other" judges like Justice Salesi Temo to disagree with me in order to save their jobs has completely undermined my influence. In my view if the Attorney General after Christmas 2011 told Anthony Gates CJ that my contract was likely to be renewed he was not speaking the truth. I believe that ever since his defeat in the recusal matter on 11<sup>th</sup> September 2011, the Attorney General has planned, if other strategies failed to unseat me, to use his power not to renew my contract in order to intimidate any other judges who were holding out against his control over the judiciary and the judgments they would give in cases heard by them.

98. Around the beginning of February 2011 Justice William Calanchini was appointed over my head as Acting President of the Court of Appeal. Justice Calanchini has no relevant experience in Criminal Law. Anthony Gates C J came to see me the night before the appointment was to be announced. He said he would not explain to me why this acting appointment had been made. He also said that he was still "*pretty confident*" that my contract would be renewed. He said that there was no certainty that the appointment would be permanent. Changes in appointments would occur weekly because a judge so appointed "*is flavour of the month*". Although he knew there would be much personal inconvenience to me, he preferred to seek my renewal within a routine batch of pending appointments.

99. I heard nothing, so on the Tuesday after Easter (10<sup>th</sup> April 2012) I said to Anthony Gates C J at morning tea that I needed to discuss my re-appointment. We went to his Chambers. He said that he had asked for my re-appointment but that it had been refused. The appointments Committee is dominated by the Attorney General and persons nominated by him who always support his proposed decisions. These persons are also in fear of the Attorney General. I reminded him that I had been recruited by him to uphold the rule of law and the independence of the judiciary. I reminded him that he had "*red-pencilled*" my original drafts in the miscarriage of justice cases of Zafir Tarik Ali and others and the later case involving Senivalati Ramuwai and Rupeni Naisoro. He knew that this had been done so that an executive observing the rule of law and the independence of the judiciary as we both understood it could have no complaint. I said that he had "*gone out on a limb*" to ensure Justice Daniel Goundar's re-appointment after 9<sup>th</sup> April 2009 and he owed it to me to do the same for me. I then reminded him of Madam Justice Shameem's good opinion. He said he would talk with Madam Justice Shameem. Taking into account her opinion he might then apply for a six month extension which would allow a lot of undelivered judgments and rulings to be handed down and thus save re-hearings. He did not hold out much chance of success should he make such application.

100. I considered the possibility of a six month extension and saw Madam Justice Shameem a few days later. She seemed conflicted about what the Attorney General who is related to her, had done but would see Anthony Gates C J. I then considered reverting to private practice. About 17<sup>th</sup> April 2012 I concluded that I would have to leave the judiciary because the interference with judicial independence had got to the stage that my attempts to resist Executive pressure upon my judgments and rulings were wholly undermined. I would refuse a six month extension if offered. It has not been offered and I do



not think I will even be told that it will not be offered. By 17<sup>th</sup> April 2012 I rejected the possibility of entering practice as a barrister and solicitor in Suva. I discuss Vergnet SA v The Commissioners of Inland Revenue below. But if a similar case arises and I am in private practice and I know the client has 100% chance of success, but that the Fiji judiciary, right through to the Supreme Court to preserve their continuing in office, will nonetheless find for the Commissioners of Inland Revenue, how can one advise the client to go to court? I could not practice under such conditions. So by 17<sup>th</sup> April 2012 I knew I would leave Fiji when I could go on leave owed to me pending termination of contract. So I leave on 28<sup>th</sup> June 2012.

### **Executive interference in the appeal of Rajendra Samy v The State**

101. On 5<sup>th</sup> September 2011 a week after the Court of Appeal started hearing the Patel and Mau case, I sat with Kankani Chitrasiri J A from Sri Lanka and a new Visiting Justice of Appeal from Sri Lanka, Sriskandarajah J A, hearing the appeal of Pita Tikoniyaroi and another. It took until 29<sup>th</sup> September 2011 to agree or not agree the reasoning whereby the Court (unanimously) rejected the appeals. I produce the judgment in Pita Tikoniyaroi and Samuela Rogoivalu as Document No. 47 in the accompanying bundle. The disagreement with my reasoning of Sriskandarajah J A and his unwillingness to change it struck me as odd at the time. I thought mine a judgment critical in a fair way of an earlier Court of Appeal who had acquitted the appellants. I also reviewed the law on recusal of judges whether at First Instance or on Appeal in view of recent cases in Fiji. The law of recusal was being used to “*forum shop*” or to propel an appeal on the basis of (usually) false allegations of apparent bias against the judge at first instance who had convicted. Finally, I criticized appellants’ counsel and the DPP’s counsel in the earlier appeal for failing to cite the dispositive authority against the appeal. It was a “*safe pair of hands*” judgment that the Attorney

General should have wanted me to give. At the time I could not figure out what was happening when Sriskandarajah J A failed to agree except on the point dispositive of the appeal. In addition why had Kankani Chitrasiri not agreed with my reasoning? With hindsight and in view of the role Kankani Chitrasiri J A played in writing the judgment on the recusal issues in Peni Mau and Mahendra Patel in his ruling of September 11<sup>th</sup> 2011, I believe that the Registrar as agent of the Attorney General within the Judiciary influenced Sriskandarajah J A to write anything that disagreed with my views. She would also have influenced Kankani Chitrasiri J A. I have said above that the Chief Registrar saying I should recuse myself in the Mahendra Patel case to satisfy the Attorney General but as my senior support staff in the Court of Appeal said, she was disapproving of both him and me. She disapproved of him because "*he was not telling me to do and say the right things.*" She disapproved of me because the Attorney General had told her to undermine me. I believe it was the 30<sup>th</sup> August through September 2011 session of the Court of Appeal which was the third out of four gazetted sessions of the Court of Appeal in 2011, that she removed my influence and that of my senior support staff in welcoming and briefing the Visiting Judges when they arrived for each session. But in September 2011, I was reluctant to consider that the Attorney General and the Chief Registrar having failed to defame me had moved on to trying to have me overruled in all situations. In other words even if it was a merited judgment of which the Attorney General would approve, I was to be undermined by those sitting with me.

102. The next Court of Appeal session, the fourth and last for 2011 commenced in November 2011. Once again, Sriskandarajah J A was a Visiting Justice of Appeal. But the Chief Justice had had difficulty in finding a second Visiting Justice. So he invited Nimal Wikramanayake Q C an anglophile Sri Lankan who had lived and practiced in Melbourne for the last thirty years. He had been

educated in law at Trinity Hall Cambridge. Anthony Gates C J has also read law at Cambridge. But Nimal had been there about six years earlier than Anthony Gates C J. When court language changed to Sinhalese in Sri Lanka, Nimal's ability to practice successfully in Sri Lanka declined and he moved to Melbourne. He is an expert on conveyancing.

103. I presided over the appeal of Rajendra Samy on 3<sup>rd</sup> November 2011 and Srisikandarajah J A and Nimal Wikramanayake J A made up the appeal panel. The first paragraphs of my judgment of 30<sup>th</sup> January 2012 set out the reasons which I developed in detail, to order a retrial before a new High Court judge and assessors.

1. *This case is about pleas of guilty to an indictment at a higher Court. In Fiji at trial before Judge and Assessors in the High Court it is called "an information" rather than an indictment, but the same principles apply. No doubt in most cases a competent counsel dedicated only to his clients interests is fully and properly instructed and the accused pleads "guilty" to the counts in the indictment. No doubt the accused understands the applicable law in respect of the elements of each offence charged and intends on the facts to plead guilty because he has accepted the facts and is persuaded that on these facts he has no choice but to plead guilty. Nevertheless there are a small number of cases thrown up by the criminal law where because of ambiguity as to his plea or involuntariness the accused cannot be held to his plea. Criminal appeal courts by way of safeguards in the system have regarded this as a mistrial or miscarriage and have granted the writ or remedy of "venire de novo" to commence the process afresh. The proviso that "no substantial miscarriage of justice" has taken place is inapplicable to this process....*

3. *This problem can be triggered if it coincides with one of the little legal*

*pockets of complexity which even very distinguished judges sometimes get wrong."*

The judgments in Rajendra Samy including the dissenting judgment of Sriskandarajah J A are in the accompanying Bundle of Documents as Document No. 48.

104. I prevailed in the result because Nimal Wikramanayake J A, although approached by Sriskandarajah J A to agree with his draft judgment, after analysis of the law, in which I took him to the relevant case reports, then assessed the facts from the Record, on his own, and agreed with me. If a judge is intent on a *male fide* judgment in order to favour one party who should fail on the facts and the law and the merits, the judgment contains indications apparent to the informed observer. Sometimes the material facts are ignored. Very often the legal arguments which should stand in the way of a *male fide* conclusion are not argued at all. In this judgment of Sriskandarajah J A the most material facts were ignored. But the key legal issues of ambiguity and involuntariness were not addressed at all. I am sure that if ten experienced judges of integrity studied these judgments they would all agree with me on this analysis. I was not acquitting Rajendra Samy. I was ordering a retrial to ensure that due process according to law was afforded in a retrial. The prosecution, when I summarised the judgments on handing them down, immediately said that they would appeal the majority decision in favour of a retrial to the Supreme Court. The DPP had been told in advance what would happen. I do not think that Rajendra Samy will get justice in the Supreme Court.

105. At the beginning of the November 2011 session, when I introduced myself to Nimal Wikramanayake he was at pains to warn me that I had to be very careful. He was saying that the Chief Registrar was out to damage me in any

way she could. I said, "*Don't worry about me.*"

because I did not believe Sriskandarajah J A would lend himself to what he did in the Rajendar Samy judgment. At that point I had in respect of Pita Tikoniyaroi not considered Sriskandarajah J A's judgment and his failure to consider what I had written as other than a reflection of a stubborn personality. The Attorney General punishes those who will not do what he wants and rewards those who do *male fide* acts on his behalf. Sriskandarajah is now a Visiting Justice of the Supreme Court which pays much more than being a Visiting Justice of Appeal. Chief Registrar Irani Wakishta Arachichi is set on her formal return to Sri Lanka to be appointed a Visiting Justice of Appeal in Fiji. It is the Attorney General who now controls judicial appointments in Fiji. So it will happen. This lady has no serious experience other than as a magistrate. It is just like appointing a Lieutenant in your navy as Vice Commodore. But then there will be no rule of law to uphold and no independent and impartial judiciary. So it will not matter except for the citizens of Fiji who deserve better. Nimal Wikramanayake J A although appointed for two years will not be invited back. He quarreled with William Calanchini J A over a minor issue on a case. While Nimal may have created difficulties, he is a man of integrity. Since his visit his reputation has been duly demonized. William Calanchini now that Anthony Gates C J has no power and influence has moved on from being point man for the Chief Justice to being the Attorney General's man in the judiciary. One of the reasons William Calanchini has been appointed Acting President of the Court of Appeal was to isolate and undermine any influence that by early February 2012 still remained with me. When Anthony Gates C J made his "*flavour of the month*" remark on informing me of Calanchini's appointment, he was confirming that the choice of William Calanchini as Acting President was that of the Attorney General. He was also signalling the reality that he is now a front man stripped of influence who keeps his job by saying and doing things to try to maintain a pretence that the rule of law and the independence of the judiciary survive in Fiji. The Chief

Registrar accompanies him to Sri Lanka and makes the decisions about who to recruit. The conspirators in the Zafir Tarik Ali case have been rewarded. The pathologist Ponnu Swamy Goundar now does all the forensic post mortems in Fiji. Ms J Cokanasiga has been re-appointed as Counsel with the DPP.

**The appeal of Ronika Devi; the appeals of Senevalati Ramuwai and Rupeni Nausori in respect of their convictions for murder.**

106. Ronika Devi and the State was heard on 9<sup>th</sup> November 2010. I presided and the other members of the appeal panel were Daniel Goundar J A and Salesi Temo J A. Because in running the Court of Appeal I am seriously hindered by the lack of another established full time appeal judge, and there was a serious backlog when I took over as de facto President of the Court of Appeal from Acting President John Byrne in October 2010, there are many judgments outstanding. I tended to give priority to writing judgments on appeals which concerned me when they were heard. I wrote my judgment in Ronika Devi v The State in November and December 2011. After some changes on account of new applicable law brought to my attention by Madam Justice Shameem my final draft was sent to my colleagues hearing the appeal in January 2012. Both Daniel Goundar J A and Salesi Temo J A agreed with my judgment, my reasoning and my proposed orders. I have commented above on the division between judges influenced by the Chief Registrar and the "other" judges. Both of these colleagues are "other" judges. They would not allow themselves to be influenced by improper considerations at this time. I handed down the judgment in Ronika Devi on 30<sup>th</sup> January 2012. The judgment is produced as Document No. 49 in the accompanying Bundle of Documents. In January 2012 I discussed it with Madam Justice Shameem together with the case of Rajendra Samy and the case of Senivalati Ramuwai and Rupeni Nausori v The State.

107. I would not have taken the step of discussing draft judgments with anyone outside the panel hearing the cases, but I had good reason for doing so.

108. The facts of Ronika Devi were that a young mother, who had been cruelly abused by her husband had taken and drowned her new born daughter and her “toddler” older daughter in the Rewa river at Nausori. She had then tried and failed to commit suicide herself. The psychiatric report accepted that she was extremely depressed at the time. It was also accepted that “*the balance of her mind was disturbed*” and that she would have been convicted of manslaughter by reason of diminished responsibility in respect of drowning her older girl except that Fiji did not enact “*diminished responsibility*” in 1957 when the other common law countries did so. She was convicted after trial by Justice Mataitoga of two counts of murder and sentenced to 20 years minimum term on each count the mandatory sentence being life imprisonment. These minimum terms were made concurrent.

109. As the judgment shows in detail the trial was not conducted in accordance with Fiji law and Justice Mataitoga had then failed to record a conviction as required by Fiji statute law and the Privy Council authority of Emmanuel Joseph v The King [1948] AC 215. All members of the Court agreed with my criticisms of the trial process. They also agreed with my conclusions concerning the minimum sentences of 20 years imprisonment imposed on Ronika Devi. I said:

*“I note that Justice Mataitoga relied on the case of **The State v Lebobo** [2004] FJHC 518 to justify a fixing a minimum term of 20 years imprisonment for Ronika Devi. This was a case where there was no insanity, no abnormality of mind and no diminished responsibility for the crimes. Lebobo entered the private home of an elderly couple aged 82 and 76 at night. He then beat the husband until he*

*lay unconscious and dying. He died as a result. Lebobo then beat up the wife and carried her small frail body to another room where he raped her. He then stole the equivalent of \$500 and departed. Mr Justice Gates sentenced Lebobo to concurrent terms of 20 years (fixed minimum) for murder, 13 years for rape and 10 years for robbery with violence. To rely on this case to sentence Ronika Devi to life imprisonment with a fixed minimum sentence of 20 years is bizarre."*

110. Under the heading "Retrial for mum who killed kids" the Fiji Times under the byline of Mary Rauto reported the case on 1<sup>st</sup> February 2012. This report is at Document No. 50 in the accompanying bundle.

#### **The case of Senivalati Ramuwai and Rupeni Naisoro v The State**

111. This case arises from the murder of Navneet Kumar at a place near Korovou in Tailevu on Friday 29<sup>th</sup> April 2005. In the opening passage of my judgment on Friday 23<sup>rd</sup> March 2012 I describe the facts as follows:

*"On the evening of Friday 29<sup>th</sup> April 2005 at about 9.00 p.m. Navneet Kumar aged 17 years was driving a white passenger hire van in the district around Korovou in Tailevu. Near the village of Matacula and close to the Wainikavula creek, one or more persons stopped him, stole \$100 in cash from him and then took him from the van. At an ivi tree above the creek he was punched until he fell down and then hit with a knife in the head and upper body. There were multiple blows with an intent to kill. The knife was bent because it was used with great force. Navneet Kumar was thrown in to the river. When it appeared that he was not dead but trying to get out of the other side of the creek he was held under the water and drowned. The knife was left at the scene of the stabbing."*

There has been considerable public disquiet in Tailevu over this case. When the



police were looking for suspects in 2005, the only reason that Rupeni Naisoro was suspected of being involved was because his father comes from the Yasawas and Rupeni wore his hair in braids. On that basis someone who was an outsider in Nayawasara was the subject of lynch mob suspicion. The investigating officers showed the same lynch mob attitude. Although a witness had given a statement to police clearing Rupeni on the morning of the Monday following the murder, the investigators framed Rupeni by threatening and nullifying this witness whose evidence would have acquitted him. About the credibility of people to think the worst of outsiders consider what Rupeni said about this aspect in an interview reported in the Fiji Times of April 1<sup>st</sup> 2012.

*"In late 2005, Rupeni was released on bail but he was not allowed to return to his home in Nayawasara Village. It was here that the burden of the crime started to take its toll, not only on Rupeni himself but also for his family, which has been by his side all through these tough times.*

*"I am a vasu to Tailevu. I am from Yasawa and my family were told to leave because we have bring disrepute to the province but my uncles stood firm and would never allow my family to leave. My parents, sister and relatives all knew how much our family and village has been talked about. You know in rural areas, news travel too quickly and there were bad things being said about us," Rupeni says."*

I produce the whole of this interview as Document No. 51.

112. Then again when A.S.P. Rupeni Raga re-investigated after in 2009 Timoci Ravurabota who was 17years old in 2005 confessed that he alone had killed Navneet in order to steal \$50 in order to go to the Coca Cola games on the next day in Suva. A.S.P. Raga found there was widespread antipathy towards the local police in Tailevu. In many statements of witnesses the police were accused of being liars in conducting the investigation and in giving evidence.

113. In the Court of Appeal I gave the leading judgment allowing the appeals with which Daniel Goundar J A and Nimal Wikramanayake J A agreed. Both Daniel Goundar J A and I requested that when important statements from the accused or from key witnesses are being taken by police there be audio or video recording of the interviews. This had been supposed to have been implemented in 2005. It has been standard procedure in the United Kingdom and other common law jurisdictions for the last thirty years.

114. I produce the Court of Appeal judgment of 23<sup>rd</sup> March 2012 as Document No. 52. This was a case where new evidence was heard before the Court of Appeal. In the first half of the judgment I set out the substance of the new evidence and I then went over seven separate matters of evidence that independently supported all the detailed facts in Timoci Ravurabota's detailed confession of September 2009.

115. Having concluded that Ramuwai and Naisoro's convictions were an absolute miscarriage of justice I then spent the second half of my judgment explaining the three factors which were the primary causes of these miscarriages of justice. I said at paragraphs 73 and 74:

*“What caused this Miscarriage of Justice?”*

*73. Those responsible for the investigation and prosecution of the cases against Senivalati Ramuwai and Rupeni Naisoro in 2005 are in a difficult position. If Tomoci had not come forward it could never be proven that someone other than Senivalati and Rupeni was solely responsible for killing Navneet Kumar.*

*74. But once it is wholly accepted that Timoci acting alone committed the crime, the actions, motives, the facts put forward as true and the evidence at trial of the investigators are exposed in an illuminating and unhappy light for them. Below, I will deal in some detail with three matters only; I focus on the*

*untrue confessions of Rupeni and Senivalati and the statement of witness Moape Kadavu of 9<sup>th</sup> June 2005."*

116. In relation to Rupeni Naisoro's false confession and the scenario put there by investigators, I concluded

*"The investigators carried through with all the actions that their false scenario and plan would require. This did not in any way serve the proper administration of criminal justice in which the people of Fiji must have confidence. These matters are one reason why there was a complete miscarriage of justice and two persons were convicted and imprisoned for a murder that they had no connection with."*

I then explained that the same intimidation and insertion of a false scenario into his statement by investigators had been a principal cause of Senivalati Ramuwai's conviction. This despite Ramuwai calling good independent credible alibi witnesses.

117. But the most important of the three reasons examined in causing the complete miscarriage of justice was the way the investigators intimidated witness Moape Kadavu into signing a wholly false statement on 9<sup>th</sup> June 2005 which was then pressed by the prosecution on the Court and read out in full to the assessors. The principal blame for this lies with the investigators. But if the prosecutor and the trial judge had known the law and practice of making witnesses hostile and the prosecutor had appreciated the importance of prosecuting fairly, the totally false statement put into Kadavu's mouth by the police, would not have been produced or relied on at trial. Kadavu after all had, when interviewed on the Monday immediately after the murder, given a statement which wholly cleared Naisoro. So the evidence Moape Kaavu gave in court, which repudiated the 9<sup>th</sup> June 2005 statement was in no way a

retraction of his evidence. This incident in the trial in my view was the principal cause of an absolute miscarriage of justice which has shocked Fijians as the newspaper reports below demonstrate.

118. The judgment was given on 23<sup>rd</sup> March 2012. On 24<sup>th</sup> March 2012 the Fiji Times published a full report which I produce as Document No. 53. Then on 26<sup>th</sup> March 2012, there was a letter from one Savenaca Vaka published in the letters column of both the Fiji Sun and the Fiji Times. This was the first mention of the case in the Fiji Sun. I produce as Document No. 54 the letter, which is in identical words in both newspapers as it appeared in the Fiji Sun. Perhaps the Fiji Sun readers enquired of their newspaper what the letter was all about. In any event on 29<sup>th</sup> March 2012 the Fiji Sun, six days after the judgment was released, finally reported, without taking up more than a few column inches a report on the judgment. I produce that report as Document No. 55. Then on Sunday 1<sup>st</sup> April 2012 there was the full page spread in the Fiji Times which is Document No. 51. I have quoted a small portion of this article at paragraph 111 above. The rest of it is commended as a fair report of the suffering caused by an unnecessary miscarriage of justice.

119. Why does the Fiji Sun not report matters of public interest? It did not report the Zafir Tarik Ali and others case, or the Ronika Devi case. It only reported the Ramuwai and Naisoro case well after the judgment and then only briefly. The answer is that the Attorney General controls news which he decides is unfavourable to the present government in the Fiji Sun. The Attorney General has a vendetta against the Fiji Times. However, the miscarriages of justice in respect of the 2005 murder of Navneet Kumar was the work of unacceptable misconduct of fairly junior police officers. It could have been wholly blamed on the previous Qarase regime. The present government could and should have said "*We will not let such miscarriages happen again.*" Nor is its vendetta with

the Fiji Times useful to the central message of the present government. The Fiji Times and its readers are more likely to be potential supporters of an inclusive non-racist society in Fiji where everyone born in Fiji, are Fiji citizens without the old distinctions. They are more likely to be pro rather than anti the Charter of Rights. The Attorney General squanders good will by wasting the government's resources tilting, if not "*at windmills*" at the present government's potential supporters.

120. The cases of Rajendra Samy, Ronika Devi and Ramuwai and Naisoro were all prepared by late December 2011. However, I was aware that however carefully I wrote the facts as disclosed by the Record in each case, and however reasonably expressed and limited my criticisms were, the reaction of the Attorney General, in view of his reaction to the Zafir Tarik Ali and others judgment, would be detrimental to my future as Resident Justice of Appeal in Fiji. There was another factor; that was that Madam Justice Nazhat Shameem had had the misfortune to be the presiding judge in Rajendra Samy and in Ramuwai and Naisoro.

121. My reasoning at this time was that if Madam Justice Shameem was prepared to accept that my judgments in these cases were no more and no less than what I was obliged to do as a Justice of Appeal of integrity, she might have sufficient influence with the executive to get my contract renewed. I already had her good opinion on Peni Mau and Mahendra Patel. She had corrected me when on an earlier occasion I had discussed Ronika Devi with her. I also wished to discuss Rajendra Samy and Senivalati Ramuwai and Rupeni Naisoro v The State with her, because she had presided in the High Court over both matters. In Rajendra Samy there had to be some criticism of the judge although the real causative factor was an alliance between a defence counsel working in the interests of his family rather than of Rajendra Samy, and the

prosecutor who wished to avoid the trial which Rajendra Samy wanted and needed. In Ramuwai and Naisoro very little blame for the fiasco could be laid on either the prosecutor or the presiding first instance judge. My judgment in the first draft blamed the prosecutor who must have known that the police evidence was very dodgy. In addition he did not know the law relating to hostile and unfavourable witnesses. So minimal blame can be ascribed to the presiding Judge.

122. In the event, Madam Justice Shameem, in line with her international speeches (Documents 2 and 3) and her stand in the Ratu Vakalalabure's petition, assured me that she had no difficulty with my role as an Appeal Judge even when she was part of the events under scrutiny. So most of the time we discussed Ronika Devi and a new, enacted in 2010, provision that curtailed the offence of infanticide. It is Section 162 (1) (a) of the Criminal Procedure Decree 2009. We discussed my paragraphs about this in which in paragraph 69, I concluded:

*"69. The logical way of sorting this and avoiding injustice which the High Court judges could not control is simply to repeal the offence of infanticide in section 205. Then since section 186 (1) (a) would be redundant it could also be removed. This would mean that depressed and/or suicidally depressed mothers would be found guilty of murder and sentenced to life imprisonment in all cases. Infanticide as an offence has been available in Fiji probably since shortly after the first infanticide Act in England which was in 1922. Medical and psychiatric knowledge has advanced since 1922 so that the objective case for infanticide and diminished responsibility is now overwhelming. Fiji would be likely to be the only common law jurisdiction to repeal infanticide. Yet human beings in Fiji are no different from those elsewhere in the world."*

Madam Justice Shameem agreed that this was a statement at which the Executive could not take offence. At least in her eyes.

123. If I believed that Madam Justice Shameem's good opinion of me in January 2012 counted with the Attorney General, I was the victim of self-delusion. But at this time I was actively trying to persuade Anthony Gates C J to recruit His Honour Judge Patrick O'Brien from England as a Resident Justice of Appeal. My point was that with two experienced judges able to do both civil and criminal cases, in the Court of Appeal and in the Supreme Court, the backlog would be dealt with and the appellate courts could bring Fiji's law and its practitioners into a better state than they had been in even prior to independence in 1970. I had obtained Anthony Gates C J's approval to inviting Judge O'Brien as a Visiting Justice of Appeal. When I raised this on 10<sup>th</sup> April 2012, it was clear that Anthony Gates C J could never get the Attorney General's approval for inviting someone with reputation and integrity to Fiji. He confirmed that if Patrick O'Brien was seen as a "clone" of myself, the proposal was a "dead letter". The Attorney General's powers in April 2012 over appointments and renewals in the judiciary had become absolute. I produce as Documents 56 and 57 a minute to the Chief Justice dated March 2012 and one e-mail letter I had earlier written to H. H. Judge O'Brien.

124. But I must revert to the three cases under discussion. While I handed down the judgments in Rajendra Samy and Ronika Devi on 30<sup>th</sup> January 2012, I had to delay the Ramuwai and Naisoro handing down until Anthony Gates C J had time to go over the judgment to check that I had made no comments which could upset a right-minded Attorney General. By this time Anthony Gates C J was not active in any serious judgment writing. For one thing he was fully employed recruiting Sri Lankans together with the Chief Registrar. For another, he buried himself in very necessary re-building of Government Building and

other court houses which only now are being adapted to meet the 2012 needs of the people for adequate court facilities. I wrote the draft of an important judgment of the Supreme Court in Makario Anisimai in October 2011. I kept reminding Anthony Gates C J of the importance of his immediate consideration. But it was not until about early February 2012 that I was called to his Chambers to discuss it. The judgment in Makario Anisimai was not handed down until 23<sup>rd</sup> February 2012. It was not the need for a re-hearing arising from the dismissal of Acting President John Byrne in October 2010 that caused the delay from the original hearing of the case on 3<sup>rd</sup> August 2010. The delay was to a substantial extent caused by the reluctance of Anthony Gates C J to engage with serious legal issues. His attitude was different during his judicial career up to 9<sup>th</sup> April 2009.

125. Anthony Gates C J made a number of “*red pencil*” amendments to my draft in Ramuwai and Naisoro. I withdrew some critical examination of the Prosecutor's decisions and left the informed reader to read “*between the lines*”. In fact, I deleted everything that had been “*red pencilled*.” But that would not save me from the *mala fides* of the Attorney General. The judgment was handed down and publicized on Friday 23<sup>rd</sup> March 2012. I doubt that there had ever been any intention of granting me a new two year contract on the part of the Attorney General. But if there was, that chance disappeared completely in the period between 23<sup>rd</sup> March 2012 and the date before Easter 2012 when the relevant Committee declined to renew my contract. I have no doubt that the reasonable and necessary criticism of investigators and the prosecutor and the publicity did not please him.

**His Honour Justice Yohan Fernando exposes the mindset of those members of the judiciary from Sri Lanka on the matter of judicial independence.**



126. Magistrate Sahu Khan had incurred considerable debts. If these are judicially confirmed in a relevant High Court judgment he will have to resign his position as magistrate. In about January 2012 Justice Yohan Fernando was assigned to hear the case. He then contacted Anthony Gates C J and is reported to have said:

*“Magistrate Koya is a friend of the Attorney General; I am going to recuse myself from hearing this civil case.”*

127. When I went to the C J's Chambers to discuss Makario Anisimai in late January 2012, I was informed by Anthony Gates C J of the matter. On being asked my opinion I said that Justice Yohan Fernando's contract should not be renewed.

128. At a judge's luncheon in the common room on 3<sup>rd</sup> February 2012 Anthony Gates C J took the opportunity, before the Chief Magistrate was asked to say grace, to address the assembled judges. He then gave a full account of the matter. He said that a recently arrived civil judge from Sri Lanka had been asked by him to hear the Koya case. This judge had agreed. He had heard the case and given judgment against Magistrate Koya. The message was that all Fiji judges must have the courage to uphold judicial independence. At the end of this speech there was nothing but bewildered silence from the listeners.

**My final chapter; policy guidelines for drugs; my service under my judicial oath is completely undermined**

129. In 2008 Kini Sulua was convicted of simple possession of 5203 grams of cannabis and sentenced to eight years in prison. On 4<sup>th</sup> November 2008 Randall Powell J A gave Kini Sulua leave to appeal and said:

*“[8] I understand that the Court has not published any comprehensive*

*sentencing guidelines for drug related offences but in all events in my opinion there are reasonable prospects that the Court of Appeal will in the circumstances of this case find 8 years prison manifestly excessive.....*

*....[11] It seems to me that it is time the Fiji Court of Appeal handed down some sentencing guidelines for drug offences which, inter alia, categorise the seriousness of offences according to types and quantities of drugs. Counsel for the State agrees that this appeal is a suitable vehicle for handing down such guidelines."*

130. This had been scheduled to be done by an appeal court of three judges headed by Acting President John Byrne. Having arrived in Suva on 16<sup>th</sup> July 2010, it was clear that John Byrne would not do anything before he retired. I agreed to preside in the appeals in place of the Acting President. No sooner had I done so, than I was told that the Attorney General had intimated directly to a meeting of judges that the judges were failing to punish drug suppliers and users hard enough. I was told that this was an intimidatory and intemperate speech by the Attorney General. So I had accepted a "*poisoned chalice*". But then I believed at this time that the Executive did not directly or indirectly interfere with judicial integrity and independence.

131. I arranged to join a second appeal involving a supply offence involving 2322 grams of cannabis by one Michael Ashley Chandra. He had been sentenced to 6 years imprisonment.

132. I presided and on the panel with me was Salesi Temo J A and Priyantha Fernando J A. The hearing was on 11<sup>th</sup> March 2011. As directed Legal Aid on behalf of the Appellants and counsel from the office of the D.P.P. presented well

researched and full argument.

133. The only domestic drug problem in Fiji is with cannabis. In the mainstream common law countries the maximum for simple possession is 5 years imprisonment and for supply of cannabis the maximum is 14 years. It is a Class B drug. For supply of heroin, a Class A drug, the maximum in these other jurisdictions is life imprisonment.
134. Any attempt to give proper guidelines for Fiji faces another severe hurdle. The Fiji legislature failed to do what the various international treaties indirectly required. It failed to divide drugs into Classes A, B and C with appropriate maximum penalties for each class. A more serious failure was to omit to legislate a supply offence of "*possession with intent to supply*". At common law there is overwhelming authority that if a person is convicted for "*simple possession*" he cannot be sentenced as a supplier. It was accepted in Fiji by the Court of Appeal in Uraia Tirai v The State with judgment on 23<sup>rd</sup> September 2009 which is Document No. 58 in the Bundle herewith.
135. The 2004 Illicit Drugs Act is an unfortunate series of legislative mistakes.
136. Another complication is that before the judgment in Kini Sulua and Michael Ashley Chandra was prepared in draft I was asked to preside in Laisiasa Koroivuki sitting with Salesi Temo J A and a new Visiting Appeal Judge from Sri Lanka, His Honour Justice Eric Basnayake. I did so on 27<sup>th</sup> February 2012. I explained to the parties that since this was another cannabis sentencing appeal, judgment would only be drafted and delivered after Kini Sulua and Michael Ashley Chandra had been drafted and delivered. This was because the comprehensive analysis and reasoning would inevitably be the same for both cases. If done *in extenso* in Sulua and Chandra, it could be briefly

summarized in Laisiasa Koroivuki.

137. I completed the draft judgment in Sulua and Chandra and sent it to Salesi Temo J A and to Priyantha Fernando J A in early March 2012. I then revised my reasoning for the proposed sentences. I had originally proposed replacing 8 years and 6 years with 3 years and 6 months (Sulua) and 6 years with 3 years and 6 months (Chandra). I now changed only the reasoning in Kini Sulua. In Kini Sulua I remained of the view that 3 years and 6 months was appropriate. In Chandra, I not only changed my reasoning but I proposed while allowing the appeal to increase the sentence from my previous proposal of 3 years and 6 months to 4 years and 3 months. On 29<sup>th</sup> March 2012 I sent my new drafts to Salesi Temo J A and to Priyantha Fernando J A. At Document No. 59 is my minute to these judges. I also sent a draft of my proposed judgment in Laisiasa Koroivuki.

138. I then in my amended draft took into account public opinion in Fiji which regards use, possession and supply of cannabis more seriously than anywhere else in the common law world. Taking into account that Fiji municipal legislation is mandated by the international drugs Treaties ratified by Fiji (and everyone else) I was able to apply a margin of appreciation of 40%.

139. The position seemed to be that if I and Salesi Temo J A agreed, Priyantha Fernando J A would also agree. Salesi Temo J A said to me that he fully accepted and agreed with my analysis and proposed orders. I believe Priyantha Fernando concurred also with my revised draft.

140. Salesi Temo J A said he also agreed with my analysis and proposed orders in Laisiasa Koroivuki.

141. The day before I minuted Salesi Temo J A and Priyantha Fernando J A, I had e-mailed through my secretary (on 28<sup>th</sup> March 2012) to Eric Basnayake J A as follows:

*"I attach the following :-*

- 1) A signed PDF version of a Minute from Justice Marshall*
- 2) Draft judgment of Laisiasa Koroivuki v. The State (for your Lordship's considerations)*
- 3) Draft judgment of Kini Sulua & Michael A. Chandra v. The State"*

On Tuesday 10<sup>th</sup> April 2012 the day following the Easter holiday, Eric Basnayake J A wrote:

*"Dear Ana, I went through both the judgments which I found well informative and I am in total agreement with regard to the reasoning and conclusion. Please inform Justice Marshall. Let me take this opportunity to wish you a Happy Easter. May God Bless,  
Justice Basnayake "*

I produce these two e-mails on one page marked Document No. 60. This meant that both judgments, that in Sulua and Chandra and that in Laisiasa Koroivuki could now be signed and delivered.

142. 10<sup>th</sup> April 2012 was also the date when I was informed by Anthony Gates C J that my contract would not be renewed. News of this was soon spread to the other judges including to Salesi Temo J A and Priyantha Fernando J A. They told me they wanted now to meet and discuss about Sulua and Chandra.

143. I arranged to meet Salesi Temo J A in my Chambers on Monday 16<sup>th</sup> April 2012 in the late afternoon. Salesi Temo J A is an honest man and every other time we have sat together we have agreed in our judgments and reasons. On this occasion he said he had a problem with my judgment. He agreed with every point about the defects of the legislation, about the unfortunate error strewn judgment in Meli Baresi and about the authoritative and many common law decisions followed in Uraia Tirai in Fiji that possessors cannot be sentenced as if they were guilty of being suppliers. Then he said, *"The problem is that if I agree with your judgment, I will be out of a job within two months. I have substantial family responsibilities and I must be able to continue to live and work in Fiji and retain my office as a High Court Judge."* He confirmed to me that when he had heard that my contract was not being renewed both he and Priyantha Fernando J A immediately recognized that agreeing with my judgment in this case seen as important to the Attorney General would result in their being terminated by the judiciary through one means or another. It is clear that the perception held by these judges was (and is) that they would have committed two unforgiveable offences in the eyes of the Attorney General. Firstly, they would not have provided the draconian sentences the Attorney General wants for cannabis offending in Fiji. Secondly, they would have agreed with William Marshall J A whose judgments must be discredited and dissented from. Indeed, wherever possible William Marshall J A must be overruled.

144. I said that I fully understood Salesi Temo J A's predicament. He then said that he would cite all recent cannabis cases in Fiji to formulate "acceptable" guidelines. I said that all these cases were based on error derived from Meli Baresi and the failure to recognize that simple possessors cannot be sentenced as suppliers. I said that it would quickly be perceived as legal rubbish motivated by extraneous considerations. I then asked what sentences in the appeals of Sulua and Chandra would satisfy the Attorney General if they were still longer

than those proposed by me. He tentatively thought 6 years rather than 8 years in Kini Sulua and 5 years rather than 6 years in Chandra. I said I would draft suggested paragraphs for his dissenting judgment that were legally less unsound than the reasons he had proposed. I did so on the next day. I now produce Document No. 62 which is my minute with tentative draft judgment composed by me attached.

145. I had been liaising with Paul Madigan J A who was writing a ruling on cultivation of cannabis plants. Everyone agrees that they are the serious suppliers but for some reason the police do not seriously prosecute them. Even under the 2004 Illicit Drugs Act, 10 – 14 years sentences could be handed down legitimately for cultivation and conspiracy to supply cannabis. Paul Madigan J A had a copy of my draft in Sulua and Chandra.

146. On either 17<sup>th</sup> or 18<sup>th</sup> April 2012 I was sitting at morning tea with Salesi Temo J A and Paul Madigan J A. Possibly Priyantha Fernando J A was present. We were discussing the “*about turn*” of Salesi Temo J A in the Sulua and Chandra judgment. Salesi Temo J A explained that in his personal circumstances he had no choice but to resile from his earlier agreement with my proposed judgment. Paul Madigan J A said words to the following effect:

*“But if you are judge you have to give the judgment you truly believe is right – even if there are personal consequences.”*

Salesi Temi J A did not give any adequate answer. I believe I said that I understood the pressures on those who, unlike me, could not afford to leave their office.

147. I had sent three versions in all to Anthony Gates C J of my proposed judgment in Sulua and Chandra. There were very small amendments. I sent the first in March 2012. I knew that although they were the only answers that an independent judge of integrity could give on the law and the facts, that it would not be what the Attorney General desired in the judgment. So, for the third and last time, I sent my draft for the attention of Anthony Gates C J's "red pencil". As usual there was not a response for weeks. On 10<sup>th</sup> April 2012 I was informed that my renewal had been declined. Thereafter probably after Salesi Temo J A and Priyantha Fernando J A had been alerted by or had consulted with one of the Attorney General's agents in the Judiciary, about their position on my draft judgment, the Chief Justice decided it was not politic or safe to "red pencil" my work. Before this time he was putting his approval on the "red penciled" version indicating that he thought there was nothing that a right minded Attorney General could complain about. Now if he did that, he might be terminated himself. Completely gone was the position of "we do it with integrity as judges independent of the Executive" that had been agreed between us on 25<sup>th</sup> November 2009. So on 16<sup>th</sup> April 2012 I received a minute from him. It is Document No. 63. He did not refer to his being in "survival mode" for his action in returning the draft unread. Instead he said he believed that I had always resented this service. I replied as soon as I received his memo on 17<sup>th</sup> April 2012. My reply is produced as Document No. 64. I was polite but firm in explaining his error.

*"I have had your assistance in only two cases. I suspect something that I said to someone has been misunderstood and passed on to you in good faith. However I can assure you that your excellent help in this regard has never been and is not now "irksome to (me) and resented".*

*I will not send it back to you. On this occasion I was dealing with legislative history. I have been in Fiji for 21 months. You have been in Fiji with some*



*interruption since 1977. I may have missed something important that you would spot."*

I do not for a moment think Anthony Gates C J believed this erroneous third party report. This relationship was much discussed between us and he knew how much I desired his help. However, by 17<sup>th</sup> April 2012 I did not say, "*You do not believe this third party report.*" We had had a truthful and productive relationship for 21 months. That relationship had ended on 10<sup>th</sup> April 2012. I did not see the point in quarrelling after 10<sup>th</sup> April 2012.

148. At our discussion on 10<sup>th</sup> April 2012 I had reminded him that he had frequently claimed to be intending to retire in 2012. I then said and he would understand that I was referring to his failure to protect my work and my office from Executive interference, "*Why don't you retire as you said you would?*" His reply was along these lines:

*"I keep being asked to stay and I therefore choose to put back my retirement."*

149. Anthony Gates C J had believed that as mostly had been the case between 2007 and April 2009 there would be no Executive interference and all his judges would decide cases impartially without succumbing to Executive pressure. He thought that Sri Lanka and his extensive connections there were being used to replace judges from Australia, with judges of equal ability and integrity from Sri Lanka. But the Attorney General did not enlighten him that by recruiting all judicial officers from a jurisdiction where Executive interference was accepted by judges would allow him to completely control the Fiji judiciary at all levels, so that all judges would give the decisions, the reasons and the orders that the Attorney General desired. However, when Priyantha Fernando was assigned to Zafir Tarik Ali in June 2010 and assisted in the wrongful conviction for

murder of four innocent Fijians, Anthony Gates C J must have had grave doubts. It must have been clear when I was framed in the Mahendra Patel case on 14<sup>th</sup> – 15<sup>th</sup> April 2011. I continued because I was still able to perform effectively. Anthony Gates C J probably thought that at least the rule of law and the independence of the judiciary continued in the Court of Appeal. But with my non-renewal and the events in Sulua and Chandra, I am rendered useless in upholding the rule of law. To use a well known analogy from the poker table, I am now “*a busted flush*”. But at least I am able to move on and not assist an Executive corrupted judiciary. In using the word “*corrupted*” I am not referring to “*money changing hands*”. I am referring to pressures on judges which result in partial judgments not in accordance with their oath. But Anthony Gates C J who in the past gave judgments in Chandrika Prasad and in the prison cases and in the Qarase period gave courageous judgments all upholding the rule of law and the independence, is now even more of a “*busted flush*” than I am. He is now a willing party to the continuing comprehensive undermining of the judiciary by the Executive. That is why I suggested on 10<sup>th</sup> April 2012 that he should now retire.

150. I now return to the events with regard to judgment in Sulua and Chandra. On 27<sup>th</sup> April 2012 Salesi Temo J A sent me his judgment. I incorporated it without change in place of his short judgment agreeing with me. I inserted a short judgment of Priyantha Fernando J A agreeing with the judgment the reasons and the proposed orders of Salesi Temo J A. In so doing I acknowledged that being in the minority my judgment was a dissenting judgment and irrelevant to the decisions and orders in the cases. I then ordered as the majority had proposed. The appeals were to be dismissed. The sentence of 8 years imprisonment on Kini Sulua is confirmed. The sentence of 6 years imprisonment on Michael Ashley Chandra is confirmed.

151. At the same time I amended my judgment in Laisiasa Koroivuki. I did so to provide short reasons why I disagreed with Salesi Temo J A's judgment in Sulua and Chandra. I recorded Salesi Temo J A as dismissing Laisiasa Koroivuki's appeal for the reasons he had explained in Sulua and Chandra. That left my judgment supported by that of Eric Basnayake J A succeeding in Laisiasa Koroivuki and The State. His appeal would be allowed and his sentence of 5 years and 11 months for possession of cannabis would be reduced to 2 years and 3 months.

152. I sent the now completed judgments in Sulua and Chandra and in Laisiasa Koroivuki to Salesi Temo J A and Priyantha Fernando J A for signature. I sent this out on 2<sup>nd</sup> May 2012 and suggested judgment in both cases be given together within a few days of 2<sup>nd</sup> May 2012. The memo by my secretary on my behalf sending these cases is at Document No. 65. I then heard nothing about either case for four weeks. I now produce the completed judgment in Kini Sulua and Michael Ashley Chandra as Document No. 66. I now produce the proposed completed judgment sent out by me in Laisiasa Koroivuki on 2<sup>nd</sup> May 2012 as Document No. 67.

153. Having had no reply to my minute of 2<sup>nd</sup> May 2012 by 8<sup>th</sup> May 2012, I deduced that the agents of the Attorney General were planning to change the outcome of Laisiasa Koroivuki. So, on 8<sup>th</sup> May 2012 I minuted Eric Basnayake J A by e-mail. I produce this e-mail as Document No. 69. What my minute states is:

*"Dear Eric,*

*Laisiasa Koroivuki v. The State*

*Salesi Temo, having agreed, on finding that my contract was not being renewed, advised me that for fear of consequences he had to disagree on both cases.*

*Since there is delay in returning the final signed copies it is possible that you are being asked to change your view. If you feel under pressure and decide to do so I will not think less of you."*

154. The completed judgment in Sulua and Chandra was agreed and judgment delivered on 31<sup>st</sup> May 2012. That is what is produced as Document No. 68. At time of writing this part of my petition, there has been no reply to my minute of 2<sup>nd</sup> May 2012 with regard to Laisiasa Koroivuki.

155. I close this part of this petition with an unpleasant item of harassment by the Chief Registrar. I have never had an interview of any kind with her. Any time she wished to send me messages she would not ask to see me and explain what she wished me to do. Instead she used the administrator who in conjunction with me managed Court of Appeal hearings. In March 2012 my senior liaison officer told me that my "out of hours" library key that I had used since September 2010 was to be removed from my possession. I had negotiated this privilege and had not abused it in any way. There had been no complaints from the Library staff. On the occasions I had used the key and thereby used the Library out of hours, it had saved me hours of work. I had to be efficient because of my excessive work load. For the same reason I often worked evenings, week-ends and public holidays.

156. I told my senior staff liaison officer that I would not give back the key. I told him to fix a meeting for me to discuss the matter with the Chief Registrar personally. He reported that she was unwilling to talk with me. I went to see Anthony Gates C J about this shortly before Easter 2012. He could see no reason why I should be deprived of my library access. I thought that he would ensure my continuing access to the library by instructing the Chief Registrar to desist. Then in late April, when I had urgent need of access, I found that

although my key still turned the lock, a bolt on the inside prevented access.

When the Library staff were asked, they said that they had been instructed to bolt the door on the inside.

157. On the occasion I raised this harassment with Anthony Gates C J, I explained all the harassment I had received from the Chief Registrar since about 11<sup>th</sup> May 2011. He simply heard what I said and made no comment. The key incident suggests that in March 2012 he was powerless in his dealings with the Chief Registrar. She simply found another way to deprive me of access to the library out of hours.

#### **Executive's civil claim in Vergnet SA v Commissioner of Inland Revenue**

158. When a foreign company agrees to supply a sophisticated finished product like a hydro-electric dam with turbines and distribution lines, it expects a level playing field when it comes to tax payment. All applicable taxes, to be charged by the receiving countries are to be in place with sections charging any particular tax in line with (for common law countries) the common law principles applicable internationally.

159. In 2005 FEA signed a "turn key" contract for 37 wind turbines to be installed at Butoni near Sigatoka with a French company, Vergnet S.A. The proposed output is described as 10 mega watts and the contract price is in excess of F\$25 million. In fact for lack of skill and maintenance the scheme is now, seven years on, only functional in a small way. It has been a waste of taxpayer's money by FEA a public corporation.

160. In 2008 after exchange of correspondence a dispute became the subject of litigation. It came before a High Court Judge in July 2010.
161. The only claim the government had was for tax on the money paid for goods and services which was F\$874,496 on account of “*know how*” tax. But there never was any transfer of “*know how*”. The contract excluded any such transfer. The common law clearly states that a transfer arises only when the overseas company enables the goods supplied, whether capital goods or consumer goods, to be produced for sale by the buyer in the receiving country. The idea that these sophisticated towers, blades, and generators as capital goods, could be produced by FEA in Fiji is not sustainable. FEA cannot even maintain the 37 turbines installed at Sigatoka. However the absence of an arguable claim in law did not stop the Attorney General from bringing the litigation.
162. In a judgment of 16 July 2010 despite its non-arguability on the facts and the law, the High Court Judge found for the Inland Revenue. In so doing he said that what was learned for post-contract maintenance including stripping down and re-assembling the turbines was a transfer of “*know how*”. The judgment of 16<sup>th</sup> July 2010 is Document No. 69.
163. The decisive issues of law are avoided in the judgment of the High Court Judge.
164. I presided over an appeal hearing in Vergnet on 10<sup>th</sup> May 2011. I was still under the illusion that the Attorney General respected the independence and impartiality of the judiciary. I had responded to the accusations regarding alleged improper behavior showing partiality to Mahendra Patel and Peni Mau on 14<sup>th</sup> March 2011 at the Holiday Inn. At the leave hearing in that case there

had - by 11<sup>th</sup> April 2011 – been no recusal application by FICAC.

165. Nonetheless, I felt oppressed that this claim had been made and that the appeal panel were expected to side with the Executive. It was in my view a claim which could only succeed on the basis that the judiciary would find for the Executive, even if to do so were against the facts, the law and merits. When I put some of the points against the Executive to their Counsel Mr Solanki in argument, I was told that the intention of legislature could be found from Mr Solanki's preferred literal interpretation of some words of section 8A of Income Tax Act. This could not be correct because the common law legislative history and decisions on the charge to tax of "know how" were obviously the primary indicia in respect of interpreting the intention of the Fiji legislature. Indeed, Mr Solanki seemed rather desperate with his arguments. It was obvious that one of my colleagues on the appeal panel Sesefo Inoke J A would side with the Executive whatever they said. At the end of the hearing I said that I would write a draft judgment and Sesefo Inoke J A said he would write a judgment.

166. Before I could give this case priority, Sosefo Inoke J A was not renewed. If that happens, the two remaining appeal judges, if they obtain the consent of the parties, can hand down a "two judge" decision. Since the Executive wanted this case dealt with quickly, it was put to me by Acting President Calanchini that I should try to persuade the third member of the panel to write a judgment and have judgment delivered before my contract ends. The third member is Izaz Khan J A, a Fijian, who now practices as a barrister in Sydney. Neither the Attorney General nor the Chief Justice wish to have Izaz Khan J A return to hear cases during the remaining part of his appointment as a Visiting Justice. This is because Izaz Khan J A is perceived to have been trying to obtain a judicial appointment in Sydney by agreeing with the Australian Government that he will not give further assistance to the Fijian government or judiciary.

Suddenly for the first session of the Court of Appeal in 2012, Izaz Khan intended to resume his Fiji duties. Then Anthony Gates C J decided to congratulate and wish him well with his Australian appointment while saying in effect that he was no longer welcome as an Appeal Judge in Fiji. Having been asked by the Acting President to contact Izaz Khan J A about Vergnet I did so. The reply eventually was that Izaz Khan J A would only correspond on this with Anthony Gates C J. After passing over the correspondence I had heard nothing more. I think it likely that Izaz Khan J A was aware that the invitation to write quickly a judgment in Vergnet was "*a poisoned chalice*". If he found against the Executive, for so doing he would never be invited back to sit on appeals in Fiji. On the other hand to write in favour of the Executive would undermine his judicial integrity and remove any chance of ever being appointed in Australia. In any event the Chief Justice and the Attorney General must have realized that I would be likely to find against the Executive in Vergnet. So they have probably opted for a new panel of compliant justices of appeal. Whether they win or lose in the appeal court, the Executive expect to win in the Supreme Court with a Sri Lankan panel agreeable to finding for the Executive in any circumstances.

167. Although I did not realize it at the time, if I had felt obliged by my judicial oath to disagree with the Executive, this would have been fatal to any renewal of my contract. Even if I had not given the judgment in the complete miscarriage of justice cases that I did, my failure to deliver a pro-Executive judgment in Vergnet would have just as certainly ended my judicial career in Fiji.

168. I suspect that the Executive's Counsel, Mr Solanki was desperate in case he lost his job if he failed to have the first instance Vergnet decision upheld. However, if the Attorney General remains in power, Mr Solanki is most unlikely to fail in the Court of Appeal or in the Supreme Court.



169. Is the objective in the Attorney General's pressure in Vergnet the general one of undermining the independence of Fiji's judges? Or is it that the Fiji Government so urgently needs the sum of F\$874,496 that it is worth pressuring the judges to deliver at the expense of the independence of the judiciary?

170. If the latter, it is a totally irrational decision by your government. To sacrifice the independence of the judiciary and the good reputation of the Fijian government and people for F\$874,496 is not a decision that you and the Military Council would knowingly make. But then the Attorney General would never mention to you or the Military Council that his decision to make the claim in Vergnet involved the intentional undermining of the rule of law and the independence of the judiciary. I shall return to the topic of completely undermining the independence of the judiciary below. While the Vergnet action may have commenced as an irrational attempt to obtain F\$874,496, when the events of 9<sup>th</sup> April 2009 happened, from that point (at the latest) the Attorney General wished a completely undermined judiciary which would do what he wanted. The Vergnet action then became one of a number of ways of furthering this objective.

171. Developing countries like Fiji need “turn key” projects now and in the future. But international suppliers are not going to make such contracts in the future with Fiji. In deciding to decline, they will say that Fiji is not a country where the courts will decide disputes fairly. They will say that when there is no independent judiciary, the rule of law is fatally flawed. So they will walk away, unless the rule of law and the independence of the judiciary are once again perceived to be being fully applied in Fiji.

172. In undermining the independence of the judiciary successfully the Attorney General abuses his office. In respect of civil claims, the lesson of

Vergnet is clear. For overseas firms and citizens of Fiji alike it is not safe to take civil proceedings relying on the impartiality of the courts. For practitioners in Fiji the question is, "*Can we practice honestly in Fiji if we cannot advise our clients of the impartiality of the judiciary?*"

### **The strange facts relating to Justice Sosefo Inoke and his tenure as a High Court Judge**

173. Justice Sosefo Inoke who comes from Rotuma was appointed in early 2009. He was an obscure personal injuries practitioner in the West. If in any other areas of the law he ran the kind of argument that he would become well-known for in his judgments, there is every reason to understand why he remained obscure. What was said about his appointment by the Attorney General and Chief Justice was that it was politic to have another "*i-taukei*" judge in addition to Justice Temo. The real reason for his appointment was that the Attorney General wished to have someone committed to turning out judgments in favour of the Executive. It was arranged that the Attorney General would be able to "*forum shop*" and send to Justice Inoke particular files in which he wanted a favourable result for the Executive without regard to the merits of the Executive's case.

174. Almost the first civil ruling I delivered in Fiji was in the case of South Sea Cruises Limited v Samsul Mody. It was an admiralty limitation of liability case. A passenger on a cruise had drunk from a bottle containing corrosive cleaning fluid thinking it was water. He was seriously injured. An International Convention applies and, through a complicated but upwards adjusting formula, limits damages to a reasonable level. South Seas had already paid out beyond this limit in paying Mr Mody AU\$135,000. South Seas had an unanswerable case in Fiji for invoking and succeeding under the International Convention (and

Protocol) Relating to the Limitation of Liability of Owners of Sea-going Ships. My ruling in South Sea Cruises v Samsul Mody of 26<sup>th</sup> August 2010 is Document No. 70.

175. Justice Inoke dismissed South Sea Cruises ' application with the following words:-

*"[15] Mody's personal injuries were not as a result of a collision between the Seaspray and another vessel. Clearly, the Act and the Conventions have no application to this case. I must say that I had to check myself to make sure that I was right. Such a slip by any counsel, let alone by both counsel from either side must be very rare.*

*[16] The application must be dismissed."*

176. Justice Inoke then ordered "*indemnity costs of \$10,000*" in favour of Mr Mody. Finally in order to prevent an appeal, Justice Inoke made his judgment an interlocutory one. Since Justice Inoke knew that this was a final order under the application, this was a dishonest act to ensure that South Seas must lose the litigation. The authorities are strongly against leave to appeal being granted if the order is interlocutory. Justice Inoke had ruled that South Seas' claim was an abuse of process.

177. Since this was the most dishonest and manifestly wrong judgment I had ever seen in 41 years as Counsel or on the Bench, I brought it to the attention of the Chief Justice. Apart from thanking me for doing so, Anthony Gates C J made no comment on my statements objecting to this judge continuing on the Bench. I then sought an interview with Christopher Pryde the Solicitor-General. I told him about South Seas and many other cases decided by Justice Inoke not

on the applicable facts and the law of Fiji, but on his subjective exercise of personal power being anything other than the law of Fiji. Like Anthony Gates C J, Christopher Pryde S G politely heard me out but said nothing.

178. Some time later when the substantive appeal was heard on 7<sup>th</sup> March 2011, Mr M Thompson S C from Australia for Mr Samsul Mody, immediately disowned reliance on everything said and done by Justice Inoke in the Court below.

179. I found that Justice Inoke had been seemingly always invited in one or two cases per session of both the Appeal Court and the Supreme Court. I was expected to continue this practice when I took over running the Court of Appeal, and I reluctantly did so. I neutralized this to some extent by choosing cases on personal injuries, where if the original Plaintiff had the merits, the facts and the law on his side, Justice Inoke could and would write a judgment that was honest and legally correct.

180. At a later time (in early 2011, I think) Anthony Gates C J said to me that the Attorney General used his power to allocate a series of land cases where the Government had an interest in succeeding. Justice Inoke had quickly found in favour of the Executive. In this discussion, Anthony Gates C J implied that the reasoning on these pro Executive decisions was completely unsatisfactory. He was obviously unhappy but did not have the power to stop this process. To do so would have meant crossing the Attorney General and this he was not prepared to do.

181. As I have said above, the judiciary was corrupted by the Executive putting the individual judges in fear. In the case of Justice Inoke, he had willingly agreed with the Attorney General to write judgments corrupt in the sense that

he would always deliver the decisions the Executive and the Attorney General wanted quite regardless of the merits of the facts and the law. From his comments and speeches at judicial gatherings, it is clear that he expected his reward would be elevation to being President of the Court of Appeal or Chief Justice. Although there is always an argument for localization of the top offices in a post-colonial situation, the other local justices were afraid that this might happen. Should your Government be replaced by the SDA headed by Qarase or another, they will care even less for the rule of law and the independence of the judiciary than the Attorney General. They will welcome Justice Inoke to the top job and he will ensure for them a corrupt judiciary that will always and indiscriminately do the Executive's bidding. This will be the nemesis of the rule of law in Fiji.

182. Another aspect of Justice Inoke's conduct concerns the rule of law. In 2009 when appointed, he had a partner of 8 years, an Australian national by the name of Ms S. S.

They had a 4 year old daughter born in Fiji. Justice Inoke on appointment as a Justice asked the Judicial Department to regularize her stay in Fiji with the Director of Immigration. Ms S. S. and Justice Inoke both had an older child (or children) by earlier partners. For reasons unknown Ms S. S.'s stay was not quickly regularized by the judicial department.

183. Following an incident involving "*children of the family*" Justice Inoke and Ms S. S. separated amidst great acrimony. Justice Inoke wished to have Ms S. S. deported from Fiji to Australia. Justice Inoke then wrote a letter on judiciary notepaper to the police at Nadi requesting or requiring that Ms S. S. be deported to Australia. That was sent to the Director of Immigration for action. The police and immigration authorities put Ms S. S. in fear and she escaped to Suva. Armed with a copy of Justice Inoke's letter, Ms S. S. complained to

Anthony Gates C J that Justice Inoke had committed the criminal offence of “*abuse of office*”. You will recollect that some time ago Beniamino Naiveli, an Assistant Commissioner of Police ordered his police to obtain an eviction order in respect of a lady who was in lawful possession of a house to which Beniamino Naiveli thought he had a civil claim. Naiveli was convicted and sentenced to 9 months imprisonment. Naiveli was fortunate to have the sentence suspended.

184. This clear abuse of power was intended to be effective by Justice Inoke. If Ms S. S. had not gone to the Chief Justice, the request or requirement would have been effective. It is a worse case of abuse of office than that of Naiveli. If the rule of law applied Justice Inoke would have been prosecuted for a serious offence of abuse of office. But the Chief Justice, instead of sending the file to the Attorney General for prosecution, covered up the case. He said that it was confidential and must not be made public. Once there is a case for prosecution there is a public interest in public prosecution. In light of that the Chief Justice should not have stifled public knowledge of the case on the spurious ground of confidentiality.

185. There is no way the Attorney General would have prosecuted Justice Inoke who was corruptly doing what the Attorney General wanted in the High Court. No doubt also the Attorney General required Anthony Gates C J to suppress the matter. Apparently Justice Inoke was also made the recipient of a non-molestation injunction. This fact was never made public. Abuse of office by Justice Inoke was covered up by act that warranted an investigation into whether the Attorney General or Chief Justice should be prosecuted for abuse of office

186. At the end of his Court of Appeal judgment in Beniamino Naiveli of 12<sup>th</sup> August 1994, the late Sir Moti Tikaram, who presided, said:

*“We wish to make it clear however that people in high office who abuse their power may well in the future be required to serve an immediate prison sentence. This comment should serve as notice to any such people that the courts are not prepared to regard such offence lightly and that they will not suspend sentences just because the consequences for such a person are severe.”*

187. Mr Mahendra Motibhai Patel recently received 12 months immediate imprisonment for abuse of office in ordering a Post Office clock without following the appropriate tender procedures. The case against Justice Inoke was arguably more serious than either that against Mahendra Patel or Beniamino Naiveli.

188. Not only was Justice Inoke not prosecuted, he was not even dismissed from the judiciary for serious misconduct.

189. On one Court of Appeal session that I organized in 2011 there were about seven out of about nine civil appeals against judgments of Justice Inoke. His appointment and his conduct in office were an affront to the rule of law and the independence of the judiciary. It is debatable whether the judgments that were based on personal whim rather than on fact and law were worse than those intentionally and corruptly favouring the Executive.

**When the Executive loses civil claims it does not pay damages to the Plaintiff; this is because the Plaintiff cannot execute against Government the payment of the judgment debt which is delayed indefinitely.**

190. This effectively cheats those that have successfully operated the civil legal system where the Defendant is Government. The present regime inherited this practice from earlier regimes. But if the present Government wished to do so, it could end this blemish on the legal system. I produce my ruling in Attorney General and Loraina Dre of 17<sup>th</sup> February 2011 as Document No. 71.

191. In that case I ordered interim damages pending appeal to a 71 year old victim of medical negligence. I said it was unfair if damages were awarded to those crippled by negligence of doctors and they did not receive any damages to alleviate their suffering before they died. At the time I thought that if I ordered payment of \$50,839 within 21 days, the Fiji Government would pay the interim damages.

192. Then I found out that the Fiji Government never pays where an award of damages is made against it. I found this out on 16<sup>th</sup> February 2011 when I heard a leave to appeal application (which the law compelled me to refuse) in the case of Ravind Milan Lal and others v The Land Transport Authority. I produce my ruling of 27<sup>th</sup> May 2011 as Document No. 72.

193. I explain the problem and offer a solution in these passages from a short ruling:-

*"2. I have every sympathy with the applicants. Mr Ravind Milan Lal obtained judgment in a personal injury suit against inter alia the Land Transport Authority on 22<sup>nd</sup> June 2007 for nearly \$900,000. Mr Lal lost his wife, two sons and a daughter in a car accident in 1991. That explains the amount of damages. It seems that the Land Transport Authority or its predecessor failed to effect third party insurance when it was obliged to do so. Damages were awarded for breach of statutory duty. Land Transport Authority in its affidavit in this application admit*



*the judgment debt.”*

*3. If this had happened when Fiji was a Crown Colony and the Fiji Government did not pay out timeously, a simple petition under Colonial Regulations would have ensured that the payout would take place. It certainly has been the policy and the commitment of the United Kingdom since the passing of the Crown Proceedings Act in 1947 that immediate payment would be made. The same applied in all Colonies. The same position applies in common law jurisdictions that share the legal history. In return for not being subject to execution in respect of judgments, the Government was committed to paying out.*

*4. Unfortunately, the law on the Crown Proceedings Act is very clear. The object in Fiji as in other countries with Land Transport Authority and Fiji Islands Revenue and Customs Authority is not to privatise government departments but to reduce the numbers of central government civil servants. So they indirectly rather than directly act as civil servants. The Crown Proceedings Act still applies. In my opinion there is no chance of execution being legally found to be available. For this reason I believe the only conclusion within the rules is that leave to appeal should be refused.*

*5. I believe the Fiji Government has never withdrawn its public position that damages awarded against it in the courts will be promptly paid out. The only circumstance in which it would be expected that it might not pay out would be if there was a sovereign default in respect of government debt.*

*6. While it is a tentative suggestion and as a strategy it might not work, there has been considerable development in public law in the developed common law world in the last fifty years. The statement and policy of paying judgments*

*when the courts have with finality awarded damages to a citizen against the Government may now be regarded as creating a substantive legitimate expectation in public law. If so there is a possibility of a judicial review of the present government stance in this case. However this is not legal advice merely the pointing out of a trend in administrative law in the major common law countries.*

*7. Perhaps the best option is to petition the Prime Minister and the President requesting payment in instalments given the appalling hardship caused to Ravind Milan Lal through no fault of his own."*

194. The legal profession in Fiji are well aware of the Government's position. Nonetheless they advise and take proceedings and no doubt charge costs to be paid forthwith from their clients. But if the payment to injured persons after the final appeal has been won in their favour is illusory, actions against government are a fraud on the system and incompatible with the rule of law.

195. I have suggested that if government does not wish to be its own insurer, it should take out indemnity insurance to cover these risks. Otherwise the only fair way to proceed is to repeal the liability in tort of the State introduced by the Crown Proceedings Act 1947. It would be the only country within the common law jurisdictions to do that. But it would be fairer than creating false expectations.

196. After my ruling in Ravind Milan Lal I heard that the Executive intended to repeal judicial review under Order 53 of the Rules of the High Court. So far, this has not happened.

197. In Shell v Sushil Chand there was an appeal by Shell against a passenger in one of their tankers who had been injured in a road accident. The Court of Appeal dismissed the appeal of Shell on liability that had been found against them in the High Court. Calanchini J then dealt with interest on post judgment awards. He explained the statutory provisions and increased the applicable interest rate. This case did not involve government in any way. However, it meant that if after many years government chose to pay out on judgments against it, the amount of interest to be paid since judgment would be substantially more. So within a few weeks it issued a decree rescinding the Sushil Chand judgment on interest between judgment and payment. In all cases it would now be capped at 4 per cent. Clearly this was done to lower the cost in cases where Government had been held liable but had not paid. However, the effect was just the same for injured persons whose *tort feisor* was a limited company such as Shell. Why should people in the position of Sushil Chand be deprived just because of personal injury cases where the Defendant is Government? ( Sushil Chand is number 19 in the CD which is Document No. )

**The use of decrees to stifle and terminate bona fide civil litigation in which the Executive has an interest.**

198. In the world at this time the only kind of acceptable government is where there is a tri-partite division of state power amongst Executive, Legislature and Judiciary. Each of these institutions must be independent of the other two. They must be transparent to the citizens to whom they are ultimately accountable. Each institution must not be weakened and particularly not weakened or dominated by one of the other two branches of government. The three divisions must, while independently performing their respective functions, co-operate. The principle of comity ensures smooth working in normal times. Where there is no legislature, it is all the more important that the Executive does

not control the judiciary and the decisions of the judges. In effect now that the Attorney General controls at all levels the decisions of the judges in the Courts, the present Executive is an unaccountable dictatorship. No doubt you and the Military Council believe it is a benevolent dictatorship.

199. It is true that in common law democracies, an Act of an independent Parliament has been occasionally used to terminate litigation being actively pursued in the Courts. That means that the elected representatives of the people have voted for it. It is only in the rarest of circumstances that such an Act of Parliament will be passed.

200. When however the Attorney General on behalf of the Executive simply signs a decree to terminate litigation, it is far removed from being the decision of an independent legislature. Such decrees have no legitimacy if they are not the product of an independent legislature. They are simply a means of cutting down on the proper application of the rule of law. They remove the judiciary from its usual role of finding the facts in a public forum. For this Attorney General it is not enough that the courts perform his will and desires in their judgments; when he wants to cover up the facts from being revealed to the public in the courts, he issues one of these decrees. As explained above they are an abuse of the concept from which they are derived, since they are not the acts of an independent legislature.

201. Take the decree that ended the FNPF litigation taken by a number of citizens. They wanted answers on a number of points:

(1) The difference between a state pension and a provident fund scheme is that a pension is paid out on an equal basis to all citizens and being generally unfunded, the payments to the elderly comes out of taxes and revenues. But this distinction has been ignored.

(2) The structure of a paid up provident fund is that of trustees and beneficiaries. The rights of the beneficiaries can be protected through court action.

(3) The trustees' task is to make sure that the managers of the fund invest the savings in Class A, B and C securities as set in the Trustees Acts. They are also to ensure that the investment managers perform competently in terms of capital gains and dividend returns. Why then were disastrous and illegal investment decisions taken by the trustees?

(4) What was the extent of the funds taken out and given to the Government to fund schemes such as Natadola and Momi Bay and for government's general revenue? Was this breach of trust started by Qarase or by your government? Was the rate of interest (a derisory one on non-performing investments) of 4% ever paid by Government to the fund?

(5) To what extent has there been criminal misfeasance in that moneys have been extracted from the trust fund illegally?

(6) Since contributions differ widely, recipients are entitled to be paid out in accordance with the extent of their contributions. Who was the person who recommended a pay out on a flat rate, effectively cheating and robbing those who had contributed the most?

202. Fiji has had an extractive government for at least the last 25 years. None of the other provident funds in Asia have failed. It was and is the appropriate policy for your inclusive government to explain why honest hard working citizens of Fiji have lost a substantial part of their savings. The Attorney General has

backed these disastrous decisions and is wholly in charge of their implementation. He wanted a cover up and so the rule of law in an important case is summarily denied by the issue and gazetting of a piece of paper that took five minutes to write.

203. The way the bona fide litigants were handled by the Attorney General in Court before this decree came into force was most unfortunate. They were belittled and intimidated. The Attorney General's lawyer came into court and said, "*Who is this Mr D. B. who is bringing these proceedings?*" Christopher Pryde, the Solicitor General, no doubt acting on the instructions of the Attorney General, on the early court hearing would intimate privately to the Plaintiff that the Court hearing would result in an order for costs against him of \$20,000 for that day. He would so apply. At later hearings the threat and the executive's application for costs rose to \$50,000. Fortunately, for the good reputation of your government, the judge did not make the orders applied for.

**The Attorney General, while censoring what is truly happening runs a campaign of intentional disinformation about the rule of law and the independence of the judiciary in Fiji.**

204. In June July 2010 in a conspiracy to convict Zafir Tarik Ali and three other innocent men of murder, the Attorney General had undermined the rule of law and achieved murder convictions. He did it by the obtaining of unbelievable new evidence from a pathologist with the help of Aca Rayawa and Jojiana Cokanasiga. He then selected a Sri Lankan judge who would convict if that was what the Attorney General wanted. A short time later on July 31<sup>st</sup> 2010, I, as the newly appointed Resident Justice of Appeal, was sitting with the other judges on the re-opening after refurbishment of Court No. 1. After the Chief Justice had welcomed me and thanked the Sri Lankan Government for supporting "*the*

stabilization" of the Fiji judiciary, the Attorney General addressed the Court. According to a news report from the Fiji Sun of 1<sup>st</sup> August 2010 of the event (which is Document No. 73) he said as follows:-

*"The Attorney General, Aiyaz Sayed-Khaiyum said the works being carried out in the judicial department creates a judicial system that is transparent and eventually members of the public and media will access court proceedings....  
.....He assured the department that Government will support judiciary to ensure that the independence of judiciary is maintained."*

At the time I did not know about Zafir Tarik Ali and others. I had been assured by the Chief Justice and the Attorney General that judicial integrity was of paramount importance and that the Executive would not pressure the judges who would remain independent of the Executive in all their rulings and judgments. I believed that what the Attorney General said was true.

205. I remember in 2011 there was the escape of Roko Ului to Tonga after his actions resulted in the Attorney General preferring charges against him. Tevita Mara (Roko Ului) obviously distrusted any prosecution process supervised personally by the Attorney General. Also he distrusted trial in the High Court where judicial independence had been corrupted by the Attorney General and where he expected to be convicted whatever the evidence against him. In view of what happened in other cases and in the Attorney General's conspiracy to falsely accuse me of being a corrupt and partial judge, it is clear that Roko Ului was correct. But what struck me at the time was that through his loyal and efficient publicity machine the Attorney General on your behalf as well as on behalf of himself unleashed on the public a further lecture on the rule of law and the independence of the judiciary in Fiji. This by an Attorney General actively engaged in completely making the judiciary his tool; an Attorney

General who by what he did was intent also on undermining the rule of law.

206. I was invited to a Judicial Department awards ceremony on 10<sup>th</sup> December 2011. By this time my only remaining illusion was that I could possibly maintain an independent judiciary in the Court of Appeal. On this occasion there were speeches by the Chief Registrar, the Chief Justice and by the Attorney General. Once again a principal theme was the same black propaganda and disinformation about how the Fiji judiciary was impartial and independent and how the Executive supported and acted in accordance with the rule of law.

207. In late 2011 the judiciary were asked to place in every room and work place a poster. At the top the principal message is in bold and under the heading "*VISION*" it says:

*"An independent judicial system meeting the highest standards of integrity and impartiality."*

But the support staff and the judges, unless they are willfully blind, know better.

208. Not content with black propaganda, the Attorney General insisted in November 2011 in making an application to have one Tai Nicholas punished in civil process for criminal contempt. Mr Nicholas' alleged crime is "*scandalising the judiciary*" a little used sub-division of contempt of court. In modern times, in mainstream common law countries, contempt of court never gets beyond a publication which interferes with the course of justice in a particular civil or criminal case. The state must not pre-judge criminal trials by asserting pending trial that the accused for given reasons is guilty. To do that makes a fair trial before jurors or assessors very difficult or impossible. Historically campaigns



pending trial for a “not guilty” verdict are within the rubric of this offence.

209. I produce as Document No. 74 a ruling of 13 April 2012 in the case of Attorney General v Tai Nicholas. The flavor of the case is in the first paragraph which says:

*“On 25 November 2011 I granted leave ex parte to the Applicant to apply for an Order of Committal against the Respondent. The order had been sought for contempt of the Court as a result of the Respondent’s comments published in the Fiji Times wherein the Respondent was quoted as saying:*

*“You should be aware that with no judiciary there, his case has been reviewed by one Australian Judge. It’s not a court per se.”*

*The Applicant alleged that those words scandalized the Court and the Judiciary in Fiji and was a scurrilous attack on the members of the Judiciary thereby lowering the authority of the Judiciary and this Court.”*

210. I was the principal legal adviser to the Hong Kong Government on contempt of court for many years.

211. The mischief is that if the author of a scandalizing publication is not punished there is a real risk that public confidence (in Fiji) on the administration of justice (in Fiji) will arise. But persons in Australia whether it be judges or journalists for the Fiji Times can say what they like in Australia. The Australian Government has been saying for years that the Fiji judges are not independent. Many governments around the world are internationally recognized as failing to apply the rule of law and of not allowing an independent judiciary. Mr Tai Nicholas is only at risk if he says that in Fiji. On the other hand the Fiji Times is very much at risk if it reports the statement of Mr Tai Nicholas in Fiji.

212. Justice Calanchini gave leave to serve the Notice of Motion on Mr Tai Nicholas outside the jurisdiction on 1<sup>st</sup> December 2011. It is well known law that any originating or subsequent process must be civil process within the 13 stated civil actions recited within Order 11 Rule (1). So the order of 1<sup>st</sup> December 2011 should never have been made.
213. Justice Calanchini since 1<sup>st</sup> February 2012 the Acting President of the Court of Appeal is now the principal agent within the judiciary of the Attorney General. As such he will have issued service overseas without regard to legality. Although he knows that the Fiji judiciary is completely undermined by the Attorney General that will not stop him finding Mr Tai Nicholas guilty and imposing an enormous fine. If Mr Tai Nicholas comes back to Fiji he may well be imprisoned.
214. All of this is humiliating to the judges and the staff of the judiciary whose morale is already at rock bottom. So why does the Attorney General make this application? The answer lies in the fact that the Australians and Mr Tai Nicholas have previously crossed him personally and must be punished at any cost. The Fiji Times is an old enemy as well. The Attorney General knows that it will pay the fine and costs of Mr Tai Nicholas. It has already offered to settle. But Justice Calanchini knows that he must pretend that the judiciary are truly outraged and punish heavily if he is to remain "*flavour of the month*" with the Attorney General.

#### **The Judgments in Praveen Ram v The State of 9<sup>th</sup> May 2012**

215. It seems that the Attorney General's black propaganda to persuade Fijians that, contrary to the facts, the rule of law and the independence of the judiciary are observed in Fiji has on 9<sup>th</sup> May 2012 taken a new turn. I produce as

Document No. 75 the judgment of the Supreme Court in Praveen Ram v The State of 9<sup>th</sup> May 2012.

216. The background is that many of the Visiting Justices from Sri Lanka have no or insufficient background in dealing with criminal cases at first instance or on appeal.

217. This was a case of alleged patricide by a son in respect of an annoying and drunk father. There were two State witnesses who testified that they heard an argument between Praveen Ram and his father, Paras Ram, and saw Praveen Ram hit his father on the head with an iron rod whereupon Paras Ram fell down bleeding from the head. One of the State witnesses said,

*"I saw Paras punch his son Praveen. I saw Praveen getting hold of an iron rod and whack Paras...I saw Paras and Praveen fighting. Paras fell down on the porch. I was shocked. I saw blood on Paras's head. Paras Ram fell down bleeding from the head."*

At trial there was also evidence from a medical expert, Dr Biribo, that the head injuries sustained by Paras Ram were most unlikely to have been caused by a fall. At the end of the prosecution case Counsel for Praveen Ram declined to make a submission of "no case to answer". In line with the evidence adduced by the Prosecution, Justice Daniel Goundar ruled that there was a case to answer. Praveen Ram gave sworn evidence. He called one witness, a sister, who testified about the state of family relationships. She had not been present when the incident had occurred. Then Praveen Ram gave sworn evidence that he had been present and had seen his drunken father who then when he, Praveen Ram, briefly turned away, Paras Ram had fallen on a nearby concrete bridge and was immediately bleeding from the head.

218. In the Supreme Court, Justice Saleem Marsoof states, upon his decision to acquit:-

*"In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe and dangerous having regard to the totality of evidence in the case."*

Said Anthony Gates, President:-

*"I agree with the succeeding judgment of Marsoof J A. At the end of the day the foundations for the conviction were found to be insecure and insufficient. The conviction was unsafe."*

The third member of this Supreme Court Panel was Justice Suresh Chandra who is also from Sri Lanka.

He said:-

*"...while concurring with the sentiments expressed by the Chief Justice, I agree with the reasoning and conclusions of Marsoof J A."*

219. The criteria for allowing appeals is statutory in section 23 (1) (a) of the Court of Appeal Act. It has been the same since 1907. The Privy Council explained in Aladaseru (1956) AC 49 the statutory words "unreasonable verdict" and in R v Hancox (1913) 8 Crim. App. Report 183 the Court of Criminal Appeal in England said that for the verdict to be overturned on appeal it has to be "obviously and palpably wrong". Applying this to the facts in Praveen Ram the opinion of the assessors and the conviction by Justice Daniel Goundar had to be "obviously and palpably right." In addition the statutory framework in section

299 of the Criminal Procedure Code Cap 21 (which is unchanged in the recent decree) expressly does not require the judge to give reasons for convicting unless he is disagreeing with the majority of the assessors. When the statutory words “unsafe” replaced “unreasonable verdict” in 1968 in England, the Fiji legislature declined to change the statutory criteria in Fiji.

220. Whether this judgment arises out of ignorance on the part of Marsoof J, or whether he was following what the Attorney General wished him to find, all the hallmarks of a judgment that is intended to reach a contrary result than what is required by the facts and the law are present in the judgment. All the key legal questions that would require that the appeal be dismissed are not mentioned let alone discussed in the judgment. The new rule of “unsafe” as cited above from the judgment of Justice Marsoof, in terms of the applicable legal framework, is legal nonsense. It is a judgment that amounts to judicial legislation on the part of the judges. It is *per incuriam* of the statutory framework and the cases thereon. It is arguably a worse decision than the famous appeal of Matiasa Raduva and John Heatley v Reginam Criminal Appeal No. 109 of 1985 with judgment on 4<sup>th</sup> July 1986. The hearings of applications for leave to appeal and of appeals themselves will now become impossible. It is a nightmare for trial judges and Court of Appeal judges.

221. That Anthony Gates C J was giving the judgment that the Attorney General wanted is clear. Anthony Gates C J knows exactly what the correct law governing appeals is. He could easily have pointed Marsoof J A towards the applicable law. I say that because of his intervention in an almost identical situation in December 2010.

222. The case of Tomasi Buli Taivaluwalu v The State was heard by a panel of myself (presiding), Madam Justice Wati J A and Kankani Chitrasiri J A (who is a

civil law judge from Sri Lanka) on 21<sup>st</sup> September 2010. Chitrasiri J A was tasked with writing a draft judgment. He did so but failed to address the statutory criteria and on one point decided to allow the appeal. I then wrote a judgment which addressed the criteria of section 23 (1) (a) of the Court of Appeal Act and concluded that the appeal should be dismissed. Madam Justice Wati J A agreed with me. I then consulted Anthony Gates C J who confirmed that my judgment was correct. He agreed to help with persuading Kankani Chitrasiri J A to abandon a view that might have, if he persisted in dissenting, caused comment about his fitness to sit as an appeal judge in Fiji. So I sent him a minute on 20<sup>th</sup> December 2010 discussing the problem. I said in this minute that he might like to discuss it with Anthony Gates C J. I produce the minute as Document No. 77. I produce the judgment in Tomasi Buli Taiwaluwalu of 7<sup>th</sup> February 2011 as Document No. 76.

223. Why would the Attorney General want this erroneous judgment of Justice Marsoof to “pose” as the law of Fiji? The main reason is that while pursuing an effective policy of having all the judges subservient to the Executive, this decision is “*a plant*” which can be used as support for his public campaign of disinformation which pretends he supports the independence of the judiciary. He knows informed opinion in Fiji regards the Sri Lankan judges as committed to favouring the Executive regardless of the law and the facts. Why not confound them with a Sri Lankan judgment at the highest level which seems liberal and opposed to the view expressed by his Counsel in Court? The Attorney General anticipates that the Praveen Ram decision will be cited when Calanchini J gives final judgment against Tai Nicholas in the contempt case. Then there is the fact that Daniel Goundar J was the judge at first instance. Daniel Goundar has been a “*hate*” figure of the Attorney General for many years. Daniel Goundar J has always enraged him by agreeing with me on key appeals. Daniel Goundar J has now “*walked away*” although he is the best criminal judge in Fiji. The

Attorney General wants Daniel Goundar J “out” for a number of reasons; at the present time there is the fact that he knows Daniel Goundar J will always as a judge act with complete integrity. With the Attorney General in control Daniel Goundar J does not see a future for himself or his family in Fiji.

224. The judges who see the Supreme Court’s decision in Praveen Ram as a huge error have said so to the Chief Justice. Apparently Anthony Gates C J describes it as an “*excellent judgment*”. The other judges would like not to follow it; but they will follow it to preserve their continuance in office.

225. The rule of law in criminal cases requires justice to be done according to law whether it results in an acquittal or a conviction. The victim of a murder may not be alive to see justice done and his killer convicted if that is the just result. Suppose Paras Ram, having been operated on to remove the haematoma that was the immediate cause of death, had survived. The charge against Praveen Ram would have been one of “*causing grievous bodily harm with intent*”. There should have been a public outcry if due to manipulation and a lack of judicial integrity, an appeal panel had acquitted a guilty man and denied a victim justice and closure. If anything the fact that the victim is dead should result in more rather than less public outcry in these circumstances. Whether it is judicial dishonesty on the back of prosecution false evidence that causes four innocent men to be found guilty or it is judicial dishonesty that causes a guilty Praveen Ram to be wrongly acquitted, it is an intentional breach of the rule of law by corrupted judges. That must cause substantial concern on the part of the public. That concern should be shared by the Prime Minister and the Military Council.

**“What do we know about the Attorney General and his rise to near autocratic**

**rule?"**

226. I start with two quotations. Firstly Lord Acton a British statesman of the 19<sup>th</sup> Century. He said:-

*"Power corrupts and absolute power corrupts absolutely."*

Secondly, Gracian an Emperor of Rome. He said:-

*"A wise man gets more use from his enemies, than a fool from his friends."*

227. The Attorney General was born in Suva in about 1968-70. His father was a civil servant and the family are Sunnis and the family prospered in the West before coming to Suva. The Attorney General has one brother Riaz who is Chief Executive Officer of the Fiji Broadcasting Commission. The Attorney General recently married Ms Ela Gavoka, who is now Director of Tourism. Earlier she was an hotel executive with the Radisson Hotel at Nadi. The Attorney General and his wife have recently had a child.

228. He was a clever, focused and hyper-active child. In the culture in which he was brought up he was over-indulged and encouraged to believe that he had "god like" talents. This lead to overweening ambition. But this, from an early age, lead to an inability to cope with rejection or denial.

229. The Attorney General has a complete inability to cope with being denied anything he desires. His subjective assessment of whether or not he should be given a promotion or an office has never been based on an objective appraisal of the situation of the organization, or the claims of other persons. But having formed a view that he has not been given what was "his entitlement" he enters an emotional state which he cannot control. When he does not have power, he leaves the organization retaining visceral hatred for



those who have “*crossed him*”. He intends to be revenged on them when he, as he is sure he will, acquires the necessary power.

230. On leaving school he entered a Murdoch owned TV company in Fiji. Because he applied himself using his intelligence and abilities, he probably impressed his superiors. But after a while, believing he knew it all, he formed a subjective view that he should be promoted to a senior post. When denied he left TV journalism. He rationalized this by now believing that media power, while real enough, was not the kind of power that he really wanted. He thought the law would be a better pathway to the kind of power he craved. So as a mature student he went to Sydney Australia intent on qualifying and training as a solicitor. He went to Minter Ellis which was and is Australia’s leading commercial firm of solicitors. Then he went to Hong Kong where he studied for an LLM.

231. We all want the members of our family to succeed in life. But most of us are only prepared to recommend children or relatives for jobs that they are well qualified to be considered for. We would not put forward relatives if they had no sufficient qualification or aptitude. However in some cultures, the preferring of relatives of no ability is a shared value in that culture. It goes hand in hand with another cultural norm. When someone succeeds in a business or organization and becomes wealthy they are expected to share their gains with the other members of their family and culture.
232. The family of the Attorney General were close to the Shameem family. The Shameems were a well connected family based in Suva. They were not wealthy. The *paterfamilias* Mr Shameem was from Lahore where he fled in 1939 as something of a political refugee. He became a commission agent. His wife had genteel cultural connections in Fiji and was a school teacher. With four daughters to educate the family struggled financially but became well regarded and more wealthy when all four daughters succeeded in their education and their career. The Shameem family are Ahmadis. Probably in South Asia and anywhere else in the world Sunnis and Ahmadis are at each others' throats. But in Fiji there is more cultural integration between the two sects. Nonetheless the strict marriage laws of not marrying outside the sect means that although families are "*culturally close*" there is no actual consanguinity between the families. Nonetheless the cultural ties referred to still apply. It is nepotism without consanguinity.
233. When the Attorney General returned from Hong Kong, Josia Naigalevu had succeeded Ms Nazhat Shameem as DPP. The latter had become Madam Justice Nazhat Shameem. She was prepared to assist her returning family friend to obtain office with the DPP. She would see it as her cultural duty to assist. But the now Attorney General had never practiced as a qualified lawyer and in his training post with Minter Ellis in Sydney would have had no experience even as a trainee in the practice of criminal law. In order to obtain the appointment even with the support of Madam Justice Shameem the now Attorney General falsely represented that he

had served with Minter Ellis as a solicitor after qualification. On the basis of this post qualification experience he was appointed to the office of the DPP.

234. However the now Attorney General was without experience. He sat in his office doing paper work, some applications and some appeals. But he did no significant trial work. The mundane criminal work he did was not seen by him as leading to the position of power he craved. But he stuck to it in the hope of promotion. But his service was that of a time server. He expected to be promoted if he had served longer than other counsel being considered for the post. Daniel Goundar was younger but having gained valuable experience as a criminal defender in the Marshall Islands was junior in service to the now Attorney General. But Daniel Goundar had been involved doing many High Court trials. For difficult cases he was the Counsel of choice.

235. As was inevitable when a promotion to a senior post became available, Daniel Goundar with a deserved reputation, was preferred to the now Attorney General who had served for a longer period.

236. There was then a confrontation about his failure to be promoted. The three present were the now Attorney General who sought that the decision be changed to appoint him, Josaia Naigalevu and Daniel Goundar. Although Josaia Naigalevu explained again and again why Daniel Goundar had been preferred, his rationality was wasted. The now Attorney General was intemperate threatening and within the grip of his emotional disposition to seek revenge if he ever had the power to carry out such revenge. Although objectively he was being treated fairly, he could only see it as an unfair denial of a position of power which he deserved. Those who "crossed" him would be made to pay. He resigned his post with the DPP.

237. The now Attorney General knew nothing about banking law of any significance. But, through further cultural nepotism he was appointed to the post of legal adviser to the Colonial Bank. His salary was large. I discount some of the reports. But it was probably \$150,000 per year. At the time this was a large sum of money for someone who had not practised as a civil lawyer and who had never been a

specialist in banking law.

238. It seems that he stayed in his office at the bank every day without much contact with the bankers whose legal problems he was supposed to be solving. What he actually did, if anything, at the bank remains obscure.

239. The now Attorney General was at a low ebb . He wished to be entrusted and to wield political power. By reason of his own decisions he was trained and experienced in nothing very much. Certainly nothing at all that would be relevant to being appointed to the position of political power that he craved. He was an unfortunate; but an undeserving unfortunate.

240. Then fate intervened when at the end of 2006 you dismissed the Qarase government. Madam Justice Shameem was your trusted and expert adviser. After you took over, she remained very influential. She had been concerned with the rule of law and the independence of the judiciary. She shared with you the need for an inclusive society where all were simply Fijian citizens. She hated the racism and the corruption of the SDA. She thought that the Charter of Rights would ensure the independence of the judiciary and the rule of law.

241. Then there was a problem of finding an Attorney General. Those connected with the Qarase regime could not be considered. All the best lawyers in Fiji had been making huge fees with their advice to the ousted regime. Madam Justice Shameem recommended the present Attorney General for that position. You with the support of the Military Council appointed him.

242. I have no doubt that Madam Justice Shameem acted in good faith in recommending her family friend as Attorney General. If she asked him if he

would support the independence of the judiciary and the rule of law, he would have convincingly lied that he would. He would give her the impression that she would lead and he would follow. To some extent Madam Justice Shameem was influenced by the “*cultural nepotism*” that she shared with the now Attorney General and many others. Overlooking his lack of relevant experience was not difficult in the absence of suitable candidates.

243. In the years 2007, 2008 the Attorney General consolidated his power. He dismissed some on the pretext of their support for the ousted regime.

244. No doubt he also replaced other officers. The new appointees would be left in no doubt that they had to do what was required of them by the Attorney General. Their appointments were always “*Acting*” rather than substantive to increase their sense of insecurity.

245. I have referred to the Attorney General's emotional disability to cope rationally with being denied something that subjectively he regarded as “*his entitlement*”. The Australian Government, on his appointment as Attorney General, immediately stripped the Attorney General of his residence status in Australia. It was part of their “*cold war*” against Fiji. You were also subjected to sanctions by “*concerned*” Commonwealth states. William Calanchini at one point was strip searched for no apparent reason after he changed citizenship and had to enter Australia as an alien. In the interests of Fiji, those who are subjected to personal sanctions have to accept the deprivation of status and personal and family inconvenience.

246. Ordinary Australian citizens without connection with the Australian government have no connection with the international dispute between Fiji and Australia. In fact, the Fiji economy depends on the visits of Australian citizens to

Fiji's many resorts. There are also many ordinary Australians living and working in Fiji. Many of these are Fijians who have temporarily or permanently migrated from Fiji to Australia in the past.

247. Suppose the Attorney General had come to you and to the Military Council and said:-

*"Having been deprived of my Australian residency status I am uncontrollably angry and wish to take revenge. There is an Australian who is a long term resident in Fiji by name of Simon Macartney. He met his returning Indo-Fijian wife at Nadi Airpot on 22<sup>nd</sup> October 2007. He drove towards Suva with her. He then, we believe, turned into a side road at Pacific Harbour and strangled her at a remote spot close to the road. Then he hid her body in the bushes. The trouble is that the only witness merely saw in the distance a European man on top of an Indian lady. This witness was some distance away. It is not clear how far away she was. From the noise she thought they were having sex. This was one hour after sunset. I wish to terminate the current information by using my power to issue a nolle prosequi. I will then have the witness make a new statement in which she will falsely state that the European man was wearing blue jeans and brown shoes. She will then falsely pretend to identify a pair of blue jeans and brown shoes that investigators have seized from Simon Macartney as the jeans and shoes that she saw. This will transform a doubtful case into a certain conviction. He will probably get life with a minimum of 18 years in prison. By doing this I will be using my official power to revenge myself on the State of Australia for removing my resident status there."*

248. Your unanimous response would be to conclude that the Attorney General was an irrational, out of control, psychopath who should be dismissed

on the spot. You would also conclude that he loved official power and gained great personal satisfaction from using his official power corruptly. You might even conclude that the Attorney General had been corrupted by the thought of using official power before he ever possessed it.

249. The law is that only the Attorney General has the power to issue a *nolle prosequi*. So the Attorney General by necessary implication was at the centre of the conspiracy which is disclosed in the following documents. I produce as Document No. 78 a report about the *nolle prosequi* being entered at Suva Magistrates Court on 6<sup>th</sup> November 2007 from the Fiji Times of 7<sup>th</sup> November 2007 headed :

*"Macartney walks free."*

Particularly chilling is the following passage:-

*"The Office of the Director of Public Prosecutions confirmed in a statement that Mr Macartney would be recharged once new evidence was ready.*

*"We will consider relaying the murder charge after the police have obtained the necessary evidence."*

*It said in the statement. The DPP said, "While sensitive to the feelings of the victim's family, it had been compelled to terminate proceedings."*

*"The decision was made on the grounds that there was insufficient evidence to lay the murder charge."*

No wonder the Magistrate, John Semisi said he was "*baffled*" that police had charged the suspect despite their investigations being incomplete. But he did not know that because Macartney was an Australian, the Attorney General was punishing him for the act of the Australian State in removing the Attorney General's status as an Australian resident.



250. As Document No. 79, I produce Miss Briana Vatucicila's statement of 4<sup>th</sup> November 2007. It is strong circumstantial evidence and it has the ring of truth. This statement was taken before the issue of the *nolle prosequi*. The Attorney General with his lack of experience and skill in criminal law thought it was not enough to obtain a conviction. If he had read and understood all the evidence in the rest of the file and been more skilled, he would have left this evidence as it was. There was substantial circumstantial evidence; more than enough to obtain a conviction.

251. As Document No. 80, I produce Miss Briana Vatucicila's statement of 10<sup>th</sup> November 2007 taken after the *nolle prosequi* had terminated the prosecution. The statement taker (Detective Sergeant Naidu) carried out his instructions from the Attorney General to the letter. Briana now said:-

*"The Indian lady was lying on the road with both her legs up in the air shaking. I also saw the male person (her partner) crouching on top of her as if they were having sex but what surprised me was that the man was still wearing his blue jeans. I also recall that this man was wearing brown beach sandals...."*

252. I produce as Document No. 81 the evidence in full of Miss Briana Vatucicila at the trial in 2008. There is no doubt that she delivered on her false evidence.

253. If you think that it is difficult for police in Fiji to persuade lay witnesses to bear false witness in Court, see the judgment in Senivalati Ramuwai and Rupeni Naisoro which is Document No. 52. See particularly paragraph 85 and see also paragraph 130.

254. There were five assessors at trial and they unanimously gave an opinion that Simon Macartney was “*guilty*”.

255. From his summing up and his judgment on sentence, it is clear that Justice Daniel Goundar did not rely on Miss Briana Vatucicila's evidence in her statement of 10<sup>th</sup> November 2007. He relied on the strong circumstantial evidence. Evidence by Macartney that his wife had left him in Sigatoka leaving her luggage behind in the car, was particularly incredible.

256. Between 22<sup>nd</sup> October 2007 and the conviction of Simon Macartney on 4<sup>th</sup> November 2008, it was realised that the attempt to persuade Briana to give false evidence about blue jeans and sandals, was in terms of the successful framing of an accused, an exercise in incompetence. This was because at an early stage in the investigation police had seized a colour CCTV tape from “Chicken Express” in Nadi, clearly showing both Simon Macartney and his wife Ashika Lata at the time they were there on 22<sup>nd</sup> October 2007. They had printed out a number of colour photos of Simon Macartney. They showed him wearing brown cargo trousers with pockets and white canvas shoes. If shown at trial the conspiracy to give false evidence would have been exposed.

257. The conspirators were the Attorney General, Josaia Naigalevu, the DPP, Ms P Madanavosa, counsel for the DPP, and some of the investigators. On realising this, the conspirators decided to say that they had not copied or retained the CCTV tape from Chicken Express. The colour photographs were interfered with so that they were in black and white and the images were now unrecognizable in any detail. In the Appeal Court the judges said that the photos had been made “*worthless*”.

258. Even then the investigators faced a difficulty. At the first interview after arrest, Simon Macartney's counsel, Simone Valenitabua, had been present. He had seen the untampered photographs. Although he did not refer to any kind of footwear being worn by Simon Macartney in the CCTV picture, he had seen that Macartney had been wearing cargo pants with pockets. The unusual steps of Defence Counsel in the course of conducting a trial, giving sworn evidence, evidence as Defence Witness 7 and then resuming his role as Defence Counsel were taken. I produce the evidence at trial of DW7 Simone Valenitabua on 24<sup>th</sup> October 2008 as Document No. 82.

259. Simon Macartney appealed and his appeal was heard by Acting President, John Byrne (presiding), Paul Madigan J A and Priyantha Fernando J A on 5<sup>th</sup> and 6<sup>th</sup> May 2010. The usual procedure is that when the appeal has been heard, the presiding judge will say, "*Judgment on Notice*" and the members of the Court will retire having taken the matter "*under advisement*". On this occasion Mr G Reynolds QC from Australia was appearing for Simon Macartney. As I have observed, Mr Reynolds QC's practise is, where he thinks the Court are for an acquittal, he will press for an immediate verdict. He did so on 6<sup>th</sup> May 2010. The Court retired and wrote on the same day a summary judgment. They ordered an acquittal of Simon Macartney and ordered his passport to be restored immediately. A second judgment of the Court was delivered on 24<sup>th</sup> May 2010 giving full reasons for acquitting Simon Macartney. The destruction of material evidence which might has acquitted Simon Macartney, is the reason for the acquittal. I produce as Document No. 83 the Court of Appeal judgments of 6<sup>th</sup> May 2010 and 24<sup>th</sup> May 2010 as if they were one exhibit. In my opinion, in view of the seriousness of the charge, the Court of Appeal should have ordered a retrial subject to conditions over evidence. Simon Macartney's passport should not have been returned.

260. The Attorney General was so upset that on 10<sup>th</sup> May 2010 Ms Madanovosa filed a motion to the Court of Appeal for an order to prevent Simon Macartney from leaving Fiji until the time for the State appealing to the Supreme Court expired. Earlier on the 7<sup>th</sup> May 2010 an appeal by the State was filed in the Supreme Court by the new Acting Director of Public Prosecutions Mr Aca Rayawa. Neither the appeal nor the motion was ever heard. The reason is that Simon Macartney cannot be served in or extradited from Australia. The irony of it is that the Attorney General's persuading of Briana to give false evidence has resulted in Simon Macartney, who would and should have been found "*guilty*", being finally acquitted.

261. The Attorney General dismissed Josaia Naigalevu as DPP and appointed Aca Rayawa in his place. Josaia Naigalevu had "*crossed*" the now Attorney General in preferring Daniel Goundar for promotion in the office of the DPP some years before. Now he was blamed for the material mistakes in the "*false evidence*" conspiracy that led to Macartney's acquittal. So there were two strong reasons for his dismissal. Now Josaia Naigalevu is "*in exile*" in a government appointment in the Solomon Islands. The fate of Mr Naigalevu for failure was intended also to be a warning to Aca Rayawa. Failure to do what is requested results in dismissal; failure to achieve what the Attorney General has requested also results in dismissal.

262. The Court of Appeal's acquittal of Macartney also resulted in final notice for Acting Vice President John Byrne in a decision taken on or about 6<sup>th</sup> May 2010. The return of Macartney's passport on that day would have been regarded as unforgivable. On or about the same day the Attorney General unblocked his veto on my appointment which was made on 4<sup>th</sup> June 2010. The Attorney General did not want me to be appointed. But he had to have someone appointed in John Byrne's place so I was appointed after a six month

delay.

#### **Four irrational conspiracies or actions by the Attorney General**

263. After the escape of Australian national Macartney, the Attorney General did not have long to wait before another ordinary person with Australian residency rights, Zafir Tarik Ali was highlighted to the Attorney General as someone who could be punished as a proxy for the Australian State who had removed the Attorney General's Australian residency status. In January 2010 James Nair chose to jump instead of being questioned. He died. The police charged manslaughter. Although there was no case for manslaughter, Aca Rayawa took a conservative view, that there being no system of coroner's inquests in Fiji, the non-natural death should proceed to trial on manslaughter. Then in June 2010 the Australian Government having seen the evidence, made representations on behalf of Zafir Tarik Ali whose wife and family in Australia were in despair not least because they lost their income when he could not, being in Fiji, attend to his employment in Australia.

264. At paragraphs 247 and 248 I have set out what the Attorney General did in Macartney with the motive of taking revenge on the State of Australia for revoking his residency status. Given the irrationality and the out of control intended behavior, I said that if he had come to you for approval for what he was intending to do, you would have dismissed him. In the case of Zafir Tarik Ali and three others it is much worse. For one thing the Attorney General would be proposing to charge four accused with murder when there was "no case" on the lesser charge of manslaughter. Even the DPP after advice was satisfied that it could be no more than manslaughter. In Macartney there was a strong case for murder which the Attorney General wished to falsely "improve" with new evidence. In Zafir Tarik Ali his proposal was to frame for murder where there was

no evidence at all. Secondly, the proposal was not only to frame one out of four who had Australian residency, it was to frame also three innocent Fijian citizens for a murder which did not happen. If the Attorney General had been asked about that he would have said:-

*"The need is for revenge on Australia because of my loss of residential status. I would prefer it if only Zafir Tarik Ali had been charged with manslaughter. These three Fijians must also be convicted of murder if I am to ensure the conviction of Zafir Tarik Ali who has the Australian residency status. Sometimes to achieve the result there is "collateral damage". Think of these three and their convictions for murder as necessary "collateral damage". "*

265. Your reaction would be the same as that set out at paragraph 248 but more so.

266. The reaction of Aca Rayawa and Ms Cokanasiga would be the same as yours. As career prosecutors they are not "*political*". While they might turn a blind eye to investigators "*improving*" the evidence when everyone was sure of guilt, they would not set about framing innocent persons of murder where there was no evidence. They would not regard personal or political reasons as sufficient to prosecute any person against whom there was no evidence of murder.

267. But both Aca Rayawa and Ms Cokanasiga knew about the Attorney General's actions in Macartney. They also knew that Josaiia Naigalevu had paid the price for the incompetent execution of false evidence which had lead to the acquittal of a guilty man. They knew that only a few weeks before, the Attorney General was enraged at the return of Macartney's Australian passport. They knew that both cases were "*run of the mill*" homicides, which would never cross the desk or come to the attention of the Attorney General, if Macartney

had not been an Australian citizen or if Zafir Tarik Ali had not been recently exposed as an Australian resident. They had no choice but to agree because they knew that if they refused they would be dismissed. They knew also that if they failed to achieve the objective of the Attorney General they would be dismissed. By the time the appeal was heard they were both dismissed on account of their failure to deliver what the Attorney General required. By the time of my ruling on 9<sup>th</sup> September 2010 describing their appeals as having chances of success "*better than even*" the Attorney General knew he would fail. Shortly thereafter they were both out of office.

268. The third conspiracy, based on false evidence for reasons of revenge, was the framing of me as a dishonest and corrupt judge who must be punished. That took place about 13 days after my lead judgment was delivered in Zafir Tarik Ali and others. The conspiracy involved the Attorney General acting personally. I was to be punished for acquitting in the Court of Appeal, a man, Zafir Tarik Ali, whose appeal I was supposed to dismiss because he had Australian resident status.

269. This third event is as irrational as the conspiracies in Macartney and in Zafir Tarik Ali.

270. The fourth irrational event involves the Attorney General acting to achieve the conviction for rape of one of his oldest enemies, one Rajendra Chaudhary. Last year there was a report that an alleged drug smuggler Ms Muskan Balaggan had been raped by her lawyer, Rajendra Chaudhary. When an appeal against refusal of bail for Ms Balaggan came before the Court of Appeal on 15<sup>th</sup> September 2011 her allegations on the file were that the Attorney General had intervened and wished to assist her in convicting Rajendra Chaudhary. The Court ignored this. But an Attorney General who

does such things corruptly because he requires revenge and enjoys exercising personal power, is wholly unfit to hold office. I produce the judgment of the Court of Appeal in Muskan Balaggan dated 15<sup>th</sup> September 2011 as Document No. 84. Having discussed irrational use of power by the Attorney General there is a possibility that such conduct is related to a major decision in April 2009 to ensure that all judges would give judgments in favour of what the Attorney General wanted. I now discuss the Attorney General's decision to make all the judges subservient to his will.

**A dependent judiciary dominated by the Executive in all its decisions. The events following 9<sup>th</sup> April 2009**

271. I submit that the evidence and documents support the following propositions:-

(1) That in 2007 and 2008 the Attorney General felt constrained to follow the policies of the Prime Minister and Madam Justice Nazhat Shameem. In particular the Charter of Rights, the establishment of FICAC and the Independent Legal Services Commission. Also the legislation to ensure that all were Fijians and that after five years residents could acquire citizenship. (All of this aimed at an inclusive society in Fiji.)

(2) The Attorney General abused power irrationally in the Macartney case in 2007. With the launch of proceedings in Vergnet SA in 2008 he was expecting the judges to forfeit integrity and independence. With the appointment of Sosefo Inoke he set up an arrangement for corrupt pro-Executive judgments to order.

(3) Before the Australian imposed judgment in Qarase of 9<sup>th</sup> April 2009, the



Attorney General was looking for an opportunity to increase exponentially his personal political power. He also wished to supplant and outgrow the influence of Madam Justice Nazhat Shameem and of Anthony Gates C. J.

(4) The Attorney General used the crisis of 9<sup>th</sup> April 2009 to gain the increase in personal political power that he wished for. By persuading you and the Military Council to abrogate the Constitution and dismiss all the High Court and Appeal judges, his intention was to subsume the judiciary within the Executive and under himself. He intended a judiciary corruptly favouring the Executive view in every case. He intended to completely undermine the judiciary; as an institution vital to the creation of an inclusive government in Fiji, the judiciary would be comprehensively and completely undermined.

(5) The Attorney General agreed with Anthony Gates C J to recruit exclusively from Sri Lanka where the judiciary has a history of supporting the Executive. Anthony Gates C J had strong connections there. Anthony Gates C J was told that Sri Lanka judges would maintain judicial independence when sitting in Fiji. This was untrue. The Attorney General's intent was that Sri Lankan judges would understand what was required by him and would deliver it.

(6) Anthony Gates C J understood that local judges of the same mind as Justices Shameem, Byrne and himself would retain judicial independence and complete integrity. Such judges would be persons minded to support the need for the present government and its inclusive policies. The Attorney General did not intend this to happen. He foresaw that in a short time any judge who preserved their independence and integrity would be either terminated in office or intimidated into conforming.

(7) Anthony Gates C J before agreeing to accept re-appointment held out

for the re-appointment of Justice Daniel Goundar and an assurance of continuing judicial independence and integrity. Since Anthony Gates C J's re-appointment was necessary in the immediate aftermath of 9<sup>th</sup> April 2009, the Attorney General pretended to agree to this.

(8) By July 2010 Justice Priyantha Fernando demonstrates that Sri Lankan judges will perform as expected by the Attorney General. He convicts in Zafir Tarik Ali and others and four innocent persons are convicted of murder. The creation of false evidence by the DPP as required by the Attorney General was critical to this result. The second factor was the trial judge's convicting as required by the Attorney General.

(9) On about 6<sup>th</sup> May 2010 the Attorney General stops blocking my appointment as Resident Justice of Appeal. His only reasoning is that it was more important that Acting President Byrne be terminated after the judgment in Macartney, than that the blocking of my appointment be continued.

(10) On 15<sup>th</sup> March 2011 the Attorney General frames a false and defamatory allegation which if it succeeds will end my career as RJA. On 12<sup>th</sup> September 2011 the Attorney General's facts in a sworn affidavit are found to be false evidence by three judges. I am vindicated. The Sun newspaper reports nothing. The Times in a report of 13<sup>th</sup> September 2011 (produced as Document No. 85) does not state that Kolinio Waqa's evidence was found to be false.

(11) In early April 2012 I am not renewed. Very shortly after, Justice Temo is intimidated by my non-renewal. He prefers keeping his office to continuing with judicial independence and integrity. By this time Acting President Calanchini and Anthony Gates C J have become agents of the Attorney General in the Judiciary.

(12) Until I am scheduled to leave on June 28<sup>th</sup> 2012 three judgments of mine are indefinitely postponed. This will mean a new hearing in these cases just to stifle my intended judgments.

**Analysis of the decision taken following 9<sup>th</sup> April 2009**

272. What the Attorney General advised you and the Military Council in the aftermath of 9<sup>th</sup> April 2009 was deceptive in a number of respects.

273. Firstly, the intention of the Attorney General was to aggrandise personal political power. I have discussed his love of power and the using of it corruptly above. So the solution that he would recommend and argue for would be the solution conferring on him very substantial power over policy and legislation going forward. It would also enable him to exercise power over those within the government and those in the private sector. But he would not ever reveal to you his real intentions in giving this crucial advice. This was (and is) a major deception practised upon you.

274. Any member of a government must act in complete good faith when advising at the highest level. He must reveal any secret agenda. He must fully, objectively and honestly explain the arguments in favour and against any proposed solution. The Attorney General dishonestly and intentionally omitted the real arguments against his preferred solution. Nor did he advise properly on the arguments in favour of or against other proposed solutions.

275. The third intentional deception was a failure to advise upon the consequences for the programme and policy of your government, if his

preference was adopted.

276. The decision in the High Court of Fiji in Qarase v Bainimarama was given by a judgment of the Court (in fact written by Anthony Gates C J) comprising three judges being Anthony Gates C J presiding, John Byrne J and Devendra Pathik J. on 9<sup>th</sup> October 2008. It is in my view an important and valuable decision. It found that the actions taken by the President and others were lawful. It is well argued and would have prevailed on appeal but for the subornation by Australia of three Visiting Fiji judges who were all Australian nationals. I do not understand why Justice Byrne chose three Australian judges unless he was constrained by the need to retain the availability of Madam Justice Shameem, Justice Daniel Goundar and Justice Sosefo Inoke for use in the Supreme Court.

277. Then came the judgment of 9<sup>th</sup> April 2009. Since the long judgment was handed down immediately after the close of arguments, it was carefully prepared in advance. It was an act of Australian sovereignty imposed upon the institutions of Fiji. It was perceived by everyone in Fiji in that light and was hugely resented by all except the SDL and supporters.

278. An important point is that when in a judicial review a law or acts are declared unlawful it is the invariable rule that the executive is given as long as it reasonably requires to implement change. In one case in Hong Kong involving discrimination the Education Department was given two years to bring in reforms. The Australians in Qarase did not follow the law in this regard because their intent and that of the Australian government was to create an immediate serious crisis.

279. The preferred solution would have been an immediate appeal to the Supreme Court. In the Supreme Court a panel of Justices Shameem, Goundar and Inoke would have restored the reasoning and orders of Anthony Gates C J in the High Court. Shameem J and Goundar J would have done so with complete judicial integrity. Inoke J would have agreed because that would be the solution preferred by the Executive if an appeal to the Supreme Court had been taken.
280. A very important consideration in favour would have been that the declarations of lawfulness in the Supreme Court would have avoided future actions claiming the President's actions were illegal.
281. If necessary a stay pending appeal could have been granted immediately. But even if a session requires gazetting (which in my view it does not) the matter could have been immediately taken to the Supreme Court. Once seized of it orders for arguments to be filed could be made if necessary. In the United Kingdom or in Hong Kong there would have been an immediate appeal to the House of Lords (United Kingdom) or the Court of Final Appeal (Hong Kong).
282. To prevent new constitutional challenges, a decree revoking or suspending constitutional actions could have been issued.
283. The problem was that the Attorney General wanted a solution that would allow him to control the judges and remove their judicial independence. But he would not disclose this intent when advising on this important matter. The Attorney General also wanted a long period using his increased powers. Therefore he wanted until 2014.

284. The Attorney General wished to abrogate the constitution. That certainly was not necessary until the Supreme Court had ruled in the Qarase case. The Supreme Court would have agreed with the High Court on the need for elections and other actions when they said at paragraph 169 of their judgment of 9<sup>th</sup> October 2008:-

*“[169] We note the completion of a census as a necessary preliminary to the holding of accurate and fair elections. We take notice of the significant demographic changes brought to light from that survey which are likely to effect a permanent and growing dominance of the Parliament by the indigenous. As was the case in Bhutto v Chief of Army Staff PLD 1977 SC 657 we do not find it appropriate to issue directions as to a definite timetable for the holding of elections. No doubt the President will have uppermost in his mind the twin imperatives of the sanctity of fair elections on the one hand and the need for urgent return to democratic rule on the other. In Mitchell (at p.94) Haynes P said the court assumed that the Government would act with reasonable despatch.”*

285. The Attorney General wanted complete control over the legislature and the judiciary; in the Executive he was already a *de facto* Deputy Prime Minister. This additional power was made achievable by the immediate abrogation of the 1997 constitution. He also wanted a longer period in order to wield his ever increasing power than paragraph 169 of the Qarase judgment allowed. In the result he got five years running all the legal and judicial institutions as well as huge power in economic affairs. He would not disclose his real reasons for abrogation and 2014. He would also believe that if the Court of Appeal Judgment was reversed in the Supreme Court there would be no urgency in abrogating the Constitution. There remained a case for that step because the 1997 Constitution returned racist, corrupt and extractive governments. But there

could be constitutional amendment discussed over two or three years. Alternatively there could have been a planned abrogation of the Constitution. A planned abrogation would have not required anything like the disruption that the aftermath of 9<sup>th</sup> April 2009 in fact caused.

286. The paranoia about Australian neo-colonialism was real. The anger at the judicial coup effected by three Australians was also real. But the Australian move could be reversed in the Supreme Court. The Australians had long ago decided that they were not going to invade Fiji. Their cold war consisted on sanctions on office holders and a propaganda campaign that was failing. It was failing because Fiji (and the South Pacific) were increasingly receiving assistance from China. It was also failing because the Australians could not see that the 2006 action had been against an ethnic cleansing racist corrupt and extractive regime which was no longer even "*democratic*". It printed excess ballot papers. Its elections were corrupt. If Australia was not quite "*a paper tiger*", its influence in the South Pacific was in decline. At the same time everyone in Fiji, not living in the villages, not in the Council of Chiefs and not in the Methodist clergy, after two years of inclusive rule under the rule of law, preferred the change that you and the Military Council had wrought in the years 2007 and 2008.

287. I would conclude that the Attorney General was active in all the three ways of dishonesty discussed above. The Attorney General advised on these crucial issues keeping his secret agenda hidden, intentionally failing to discuss in good faith the "*pros*" and "*cons*" and relentlessly in favour of abrogation so that he could enjoy immense power for 5 years.

288. Informed opinion and indeed most people in Fiji detest the secrecy censorship and black propaganda that this manipulative public officer directs in

detail. Censorship may have been required to some extent in 2006. Even today seditious publications by or on behalf of political opponents should be censored. The Attorney General however, uses censorship to avoid anything transparent emerging about the government and for "*black propaganda*" that is exactly the contrary to what is actually happening. All this wastes the goodwill that could be accruing to the government if you went back to transparency. It is obvious to all that the Fiji Sun is the Attorney General's mouth piece.

289. I revert to the Roman Emperor Gracian. He said :-

*"A wise man gets more use from his enemies, than a fool from his friends."*

Leave aside discussion of his "*friends*". Let us focus instead on his "*enemies*". There are never enough resources to prosecute everyone who commits extractive crime when in power. Therefore, common sense says, investigate and prosecute the biggest offenders. Instead it is back to those who have, in the Attorney General's mind, "*crossed him*". His opinions on this are obfuscated by his lack of objectivity. His anger is uncontrollable and it results in irrational actions for which the government receives the blame. More important is the fact that many opponents could be won over to supporting, or at least not opposing the present government. Why continually fight old battles when one of the arts of politics is to "*move on*"?

290. What are the true values of the Attorney General? Underneath the propaganda they are "*extractive*" values rather than "*inclusive*" values. They are the values of an 18<sup>th</sup> Century autocrat. The tyrannical kind of autocrat rather than the benevolent kind. The non-transparency that he practices is there to cover up from general view the fact that his true values are "*extractive*". Fiji is a small place. When he denies drawing of emolument of five



or six hundred thousand or so per year, people do not believe him. To them it is just another form of extractive double dipping.

**You must dismiss the Attorney General or pass the reins of power to someone in the Military who will.**

291. In summary the reasons are:-

(1) He has completely made the judiciary a corrupt agency of the Executive. He was not instructed to do this and he has kept it secret from you. Informed public opinion has arrived at this conclusion. One pointer is a comprehensive takeover by judges from Sri Lanka. Another pointer is that reports of cases that cause real concern to the public continue to leak out. In destroying the independence of the judiciary, there is now no rule of law in Fiji.

(2) The Attorney General's methods in attaining his ends, always involve lies or deception. Very often they involve conspiracies to do something unlawful. The manipulation involved is akin to blackmail. He appoints them and requires them to do something unlawful. If they refuse they are dismissed. If they fail to accomplish his object or "cross" him in any way they are to be dismissed. They are also to be punished. He uses his power of dismissal of those that stand up to him to intimidate others who then choose to co-operate with his orders.

(3) Without your authority or knowledge he does irrational things on behalf of government. The facts of the intervention in Zafir Tariq Ali and others, for a wholly irrational reason, is the leading example. But the intervention in Macartney which is done so badly for the same irrational reason that a guilty man goes free is almost as bad. The attempted framing of me as a corrupt and partial judge in April 2011 may not have been irrational in serving to attain his objective of completely undermining the independence of the judiciary. But it is

irrational behavior for your government if in truth you wish to have the rule of law and an independent and impartial judiciary. These three matter are at *prima facie* the criminal offence of abuse of office and *prima facie* the criminal offences of conspiracy to pervert the course of justice. The Attorney General's successful campaign to destroy the rule of law and the independence of the judiciary in Fiji, is, if not authorized by you and the Military Council, on a *prima facie* basis the offence of abuse of office.

(4) By intentional dishonesty (as discussed above) the Attorney General has in his advice following 9<sup>th</sup> April 2009 caused this administration to depart from its intended path. The intended path of a transparent inclusive Fiji and the fights against racism, corruption and crooked lawyers are, if followed consistently, in the best interests of all Fijian people. When elections of whatever sort arise in the near future they would have succeeded with the voters. But the actions of this Attorney General have discredited your government and caused serious damage to the electoral prospects of anyone associated with it.

(5) The only way to revive the electoral fortunes of your just cause is to forthwith dismiss the Attorney General and his agents or beneficiaries of cultural nepotism practised by him. Then there must be transparent governance in line with the policies that required you to act against Qarase in 2006.

(6) I am not alone in foreseeing "a dark age" if your just cause does not prevail in elections. I produce as Document No. 85, an article from the Fiji Sun dated 13<sup>th</sup> June 2012. The article quotes Colonel Moses Tikoitoga. The headline "RFMF We fear corrupt leaders coming back." I believe Colonel Mosese Tikoitoga is quite right. But he should also be concerned that if the Attorney General continues within your administration, there will be no avoiding this "dark age" of corruption.

**Suggestions for reviving the rule of law and the independence of the judiciary**

292. The Chief Justice Anthony Gates should retire. He should have elected to retire when the Attorney General finally subdued his resistance and made him his agent within the Judiciary.
293. The Chief Registrar should be dismissed. William Calanchini fears losing office but is otherwise honest and should be made Independent Legal Services Commissioner. Paul Madigan can then revert to other work.
294. I would appoint Madam Justice Nazhat Shameem as Chief Justice. But only if you are satisfied that she will act in accordance with her internationally expressed views which are Documents 2 and 3. Only if she is no longer “*conflicted*” by cultural ties with the Attorney General. In my opinion she is a woman of ability and integrity and would restore the judiciary to a culture of integrity and independence.
295. There must be an appointment of someone of courage and integrity in the office of Attorney General. The person I would have confidence in is Ms Shaista Shameem. Other legal staff serving with the present Attorney General should be retained or dismissed on a careful appraisal after they have been interviewed.
296. If Madam Justice Shameem will not serve or otherwise, you need a Chief Justice. I would recommend Justice Salesi Temo. Without threat of unjust dismissal he would revert to his role of being an upholder of the rule of law and the independence of the judiciary.

297. You urgently need someone of ability, integrity and judicial experience in the Court of Appeal. At Documents Nos. 56 and 57 are details of His Honour Judge Patrick O'Brien. I was intent on persuading the Chief Justice to appoint him. I would appoint him as President of the Court of Appeal. He would then have to be authorized to find a Resident Justice of Appeal. If Salesi Temo is made Chief Justice it is vital to have someone like Judge O'Brien from whom he could take advice.

298. With regard to the appeal judges from Sri Lanka in the Court of Appeal and in the Supreme Court, their appointments should be terminated.

299. With regard to High Court Justices and Masters from Sri Lanka there are many who could continue to serve. They would have to commit to being dedicated to upholding the independence of the judiciary in Fiji. Those who have blatantly served the present Attorney General should be dismissed.

### **New law for governance of Fiji and for elections**

300. This is the most important matter arising from arranging your takeover in late 2006. It is unfinished business. I would probably be of similar mind to the present Attorney General in this matter.

301. I would like to discuss it in historical context. The Colonial Government has a lot to answer for starting in 1874 and through to their premature withdrawal in 1970. In respect of Indo Fijians the cultural antagonism to marriage other than with only relatives of their own sect was a problem. Every other race has intermarried with Fijians. But this is not the time for discourse.

302. Having a society divided by culture and ethnic origin is a problem. It is not unique. It is rare but not unique. Very recently Belgium functioned without a government for about one year. In Northern Ireland recently when Ian Paisley became leader he insisted that the Nationalist leader Martin McGuinness who was his Deputy, shared a room with him and stayed with him through every political meeting. The object was to prevent misunderstandings which could be exploited by active partisans on either side of the debate.
303. The Westminster model where the executive controls the legislature cannot work where there is a tendency towards extractive leadership. Nor is it necessary with a population of 850,000 or so to have other than a "city style" administration albeit with competent District Officers in more remote regions. Extracting for one's province, one's provincial leaders and one's provincial electorate has been the name of the game for far too long.
304. No one questions the democratic credentials of the United States. Two features are relevant to Fiji. One is the fact that the electors, within universal suffrage, vote for a "slate" of two leaders. They are, of course, the President and the Vice President. In the context of a culturally divided nation such as Fiji, that could be used to advantage. The Presidential candidate could be an honest and inclusive Fijian. The Vice Presidential candidate could be an honest and inclusive Indo-Fijian or a person of similar qualities of mixed race provided it looked to the electors that "*the team*" could work together. They would win broad support and an inclusive Executive would be elected.
305. The other feature of the United States is that the Secretaries are not elected. They have to be approved by a committee of the legislatures. The scrutiny is of every aspect of their background and their expertise. The FBI provides "*in depth*" background checks. A similar system in Fiji could work to

avoid extractive politicians working the levers of power in Government.

306. There is more, but I do sense that you and the Military Council are thinking along the same lines.

307. Since I will not be in Fiji when this reaches you, I can always be contacted at the following e-mail address where the person using that address can be trusted to pass on serious communications to me. So send to me at :-  
[address removed from the document]

### **Climate of fear**

308. This petition has been produced by me alone assisted administratively by my wife. That is because everyone fears the Attorney General. My secretary, Ana Cobona, has not helped me and has not read it. Likewise Raven Kumud, who assists me as an appeal judge, has not been involved.

309. I share the fears. That is why I have worked without the assistance of others. That is why I cannot have the petition before you until the books are closed on my contract with government. I have great difficulty in finding agents willing to deliver the petition and supporting documents to you. This is only because of the all-embracing climate of fear created by the Attorney General.

310. The importance of the correct statutory solution to the governance problem is enormous. It is critical to the future of the people of Fiji. Without the present Attorney General, you need someone like myself to advise the Government. This is the only reason why, within the climate of fear, I would possibly consider returning to Fiji. But even if the present Attorney General and

his agents are dismissed from Government, on behalf of myself and my family I deeply distrust this irrational and vengeful man. Perhaps you could consider an "*Apolosi Nawai solution*". The present Attorney General could be exiled to Rotuma without access to internet facilities.

I remain your Humble Petitioner

William Roberts Marshall

Dated this 21<sup>st</sup> day of June 2012