In the High Court of Fiji
At Suva

Action No. 124 of 2008

IN THE MATTER of an application by
THE ATTORNEY GENERAL OF FIJI
for the leave to apply for an Order of Committal

AND

IN THE MATTER of **FIJI TIMES LIMITED, REX GARDNER,** at all material time the publisher of Fiji Times Ltd and **NETANI RIKA,** at all material times the editor-in-chief of Fiji Times Ltd.

Coram: **Hickie, J**

Date of Hearing: **4 December 2008**

Appearances: **Mr C.Pryde, Solicitor-General, with Mr K. Singh for the Applicant**
Mr R. Naidu with Mr A. Prasad for the First, Second and Third Respondents

Date of Decision: **22 January 2009**

JUDGMENT

A. BACKGROUND

[1] Just on 40 years ago, Lord Denning had this to say in the English and Welsh Court of Appeal about criticisms of the judiciary:

> *"It is the right of every man [and woman], in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticize us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.*

> *Exposed as we are to the winds of criticism, nothing which is said by this person or that,* ***nothing which is written by this pen or that, will deter us from doing what we think is right; nor,*** *I would add,* ***from saying what the occasion requires****, provided that it is pertinent to the matter in hand.* ***Silence is not an option when things ill are done.****"* (Lord Denning MR in ***Regina v Commissioner of Police of the Metropolis, Ex parte Blackburn (No 2)*** [1968] 2 QB 150 at 155B)

In the same case, Lord Salmon (at page 155G) said:

> *"It follows that no criticism of a judgment, however vigorous, can amount to contempt of Court,* ***providing it keeps within the limits of reasonable courtesy and good faith****."*

Lord Edmund Davies (at page 156E) agreed saying:

> *"The right to fair criticism is part of the birthright of all subjects of Her Majesty. Though it has its boundaries, that right covers a wide expanse, and its curtailment must be jealously guarded against. It applies to the judgments of the courts as to all other topics of public importance.* ***Doubtless it is desirable that critics should, first be accurate and, secondly, be fair, and that they will particularly remember*** *and be alive to that desirability if* ***those they would attack have, in the ordinary course, no means of defending themselves****."* [My emphasis]

[2] In the context of the present case before the Court, the major issue to be decided is what sentences should be imposed upon each of the three Respondents following the publication of a letter in *The Fiji Times* which did not keep "*within the limits of reasonable courtesy and good faith*" (nor was it *"accurate and fair"*) such that their Counsel has entered pleas of guilt for each of them for the offence of contempt by scandalising the High Court of Fiji and three of its judges?

[3] It should also be noted that as far as both the Court and Counsel for the respective parties are aware, this is also the first recorded case dealing with contempt by way of "scandalising a Court or a judge" since the 1997 Constitution came into force. The two previous relevant cases for contempt by scandalising a court or judge in this country being: ***Parmanandam v Attorney-General*** (1972) 18 FLR 90; Paclii: [1972] FJCA, http://www.paclii.org/fj/cases/FJCA/1972/3.html) dealt with under the 1970 Constitution; and ***Chaudhary v Attorney-General*** (1999) 45 FLR 87; Paclii:

[1999] FJCA 27, http://www.paclii.org/fj/cases/FJCA/1999/27.html) which, although heard in 1998 and 1999, concerned (amongst other matters), as the Court of Appeal noted, "*the effect on the law of contempt of the provisions of the 1990 Constitution then in force relating to freedom of expression"*.

[4] *The Fiji Times* is the longest serving newspaper in the Fiji Islands, claiming publication since September 1869, thus making this coming September the newspaper's 140th anniversary. It is owned by the News Limited group, a large international news media organisation. On its behalf, it has been claimed that the general managers/publishers of *The Fiji Times* are typically appointed from outside of Fiji serving periods ranging from three to six years and are generally newspaper executives of wide experience. The Court has also been advised that *The Fiji Times* has never previously been prosecuted for contempt, is a founding member of the Fiji Media Council and bound itself to the council's code of ethics. Indeed, the current Chairman of the Fiji Times Limited has stated in affidavit that *"ethical standards are important, bearing in mind the considerable power of the print media in the public arena and the respected reputation of Fiji Times Limited, which in some respects is its most important asset."*

[5] According to *The Fiji Times*, its stated editorial policy in relation to the publication of letters to the editor (as published daily on its editorial/letters page) is as follows:

> *"All letters and email (no attachments) to The Fiji Times must include the sender's full name, home address as well as day and evening phone numbers for verification.*
>
> *Letters with noms de plume will not be accepted.*
> *Ideally, letters will be a maximum of 200 words. By submitting your letter for publication, you agree that* ***we may edit the letter for legal****, space or other reasonable* ***reasons*** *and after publication in the newspaper, republish it on the Internet or in other media.*
>
> ***Letters published or submitted elsewhere will not be given priority****."*
> [My emphasis]

[6] On 22 October 2008, the following letter to the Editor was published on page 6 of *The Fiji Times* as follows:

> *"Court ruling*
>
> *A DARK day in the annals of Fiji's judiciary and legal history was brought about by* ***the totally biased, corrupt and self preserving judgment handed down by Anthony Gates, John Byrnes [sic] and Devendra Pathik [sic] in the Qarase vs Bainimarama case.***
>
> *I do not know Mr Qarase nor am I a member of the SDL but I know when an unjustice [sic] has been committed and I believe that the injustice in this case must be condemned by all law abiding citizens …*
>
> ***The judiciary was tainted from the day*** *Justice Daniel Fatiaki was forcefully removed and* ***Anthony Gates unashamedly usurped his position****.*
>
> ***Gates' efforts to legalise the immunity is laughable given the immunity was designed to protect him also.***
>
> *Thank you Mr Qarase and keep up the good fight against oppression, tyranny and injustice.*
>
> ***VILI NAVUKITU***
> ***Queensland, Australia***"

[7] On the same date as the above letter was published, the Applicant filed an ex parte notice for leave to issue an Order of Committal together with a Statement and Affidavit in support. That application was heard the following morning on 23 October 2008 and leave was granted in accordance with Order 52 Rule 2 of the High Court Rules 1998 and the matter was given a mention date returnable on 10 November 2008.

[8] On 29 October 2008, the solicitors for the Respondent newspaper wrote to the Applicant admitting that the article was in contempt.

[9] On 5 November 2008, the following apology was published in *The Fiji Times*:

> "*We're in contempt*

On 22 October 2008 The Fiji Times published a letter to the editor from a person named as Vili Navukitu said to be of Queeensland, Australia, which described the High Court ruling of Fiji in the Qarase v Bainimarama case in a contemptuous manner:

The Fiji Times accepts that, while persons may comment critically on judgments of the court, there are reasonable limits on such criticism, and the words used by our correspondent exceeded those limits in casting doubt on the integrity and independence of Fiji's courts.

The Fiji Times acknowledges that, in publishing those comments, it committed a contempt of court.

For this it apologises, unreservedly, to the judges in the case and to the High court of Fiji, it acknowledges that, as a responsible newspaper publisher, it must exercise great care in publishing comments on legal proceedings, the judiciary and the court system generally.

The Fiji Times has offered to pay costs to the office of the Attorney-General, which has begun court proceedings in respect of this contempt."

[10] On 10 November 2008 the three Respondents appeared in court whereupon their Counsel admitted that they were in contempt by publishing the said letter on 22 October 2008 and the matter was sent down for a plea in mitigation on 4 December 2008 together with a timetable for the filing of written submissions.

[11] As virtually the same letter was published by the *Fiji Daily Post* newspaper on 17 October 2008, an application in relation to that alleged contempt was also filed and made returnable on the 29 November 2008. Why I mention that matter is that the contempt involving *The Fiji Times* was also re-listed for that date to see if it was possible to hear both matters together. As Counsel who appeared for the *Fiji Daily Post* on 29 November 2008 explained that this was not possible, due to one of his clients being overseas, the first contempt involving solely the plea in mitigation for the publication which appeared in *The Fiji Times* was confirmed for hearing on 4 December 2008.

[12] In the meantime, the following documents were filed by Counsel for the respective parties:

(a) Written submissions on behalf of the Applicant dated 24 November 2008;

(b) Written submissions for the Respondents dated 1 December 2008 together with the following affidavits in support –

(i) Affidavit of **REX FREDERICK GARDNER**, Chief Executive Officer of Fiji Times Limited and acting publisher of *The Fiji Times,* sworn and filed on 1 December 2008;

(ii) Affidavit of **NETANI VAKACEGU RIKA**, Editor in Chief of Fiji Times Limited including the *Fiji Times,* sworn and filed 1 December 2008;

(iii) Affidavit of **ROSS GEORGE McDONALD**, Company Director, Chartered Accountant and Chairman of Fiji Times Limited, sworn and filed 1 December 2008;

(iv) Affidavit of **DARYL VALENTINE TARTE**, Company Director and Chairman of the Media Fiji Council, sworn and filed on 1 December 2008;

(c) Supplementary Submissions by Counsel for the Respondents dated 2 December 2008;

(d) Affidavit of **SHARILA PRASAD LAZARUS**, Media Liaison Officer with the Office of the Attorney General sworn and filed on 3 December 2008, which was rejected by the Court for reasons set out below.

[13] The plea in mitigation hearing proceeded on 4 December 2008 with Counsel speaking to their respective written submissions. In addition, oral evidence was given by both Mr RIKA and Mr TARTE.

B. THE LAW OF CONTEMPT IN RELATION TO SCANDALISING A COURT OR JUDGE

[14] It is has been conceded by Counsel for the Respondents in his submissions that there is "an admitted contempt of court". But what does this mean? As the New South Wales Law Reform Commission explained in its 2003 report on "Contempt by Publication" at paragraphs 1.9 and 1.11:

> *"Traditionally, the law of contempt is divided into 'civil' and 'criminal' contempt. 'Civil contempt' is concerned with the enforcement of court orders and undertakings given to a court in civil proceedings. '**Criminal contempt' is concerned with maintaining the authority and integrity of the court as a matter of public interest.** It*

covers such conduct as misbehaviour in the courtroom ***and publishing material that tends to interfere with the proper administration of justice. Conduct of this nature is treated as a criminal offence and attracts criminal sanctions****, most typically the imposition of a fine or a term of imprisonment.*

…"A person may be guilty of contempt by publication if they publish material that:

- *has a tendency to influence the conduct of particular pending legal proceedings, or prejudge the issues at stake in particular pending proceedings;*
- ***denigrates judges or courts so as to undermine public confidence in the administration of justice [This is known as 'scandalising the court']****;*
- *reveals the deliberations of juries;*
- *includes reports of court proceedings in breach of a restriction on reporting; or*
- *discloses information that has been restricted by an injunction and the person making the disclosure, though not bound by the injunction, knows the terms of the injunction and that the publication will frustrate its purpose."* [My emphasis]

(See New South Wales Law Reform Commission, *"Contempt by Publication"*, Report 100, June 2003, "Overview of the Report", *http://www.lawlink.nsw.gov.au/lrc.nsf/pages/r100chp01)*

[15] The law in relation to the particular form of contempt in this case, that is, "scandalising a Court or a judge", has been well set out by the Supreme Court of Malaysia in ***Attorney General & Ors v Arthur Lee Meng Kuang*** [1987] 1 MLJ 207; (see also Supreme Court of Malaysia, Kuala Lumpur, Civil Application No. 7 of 1985, Mohamed Azmi J, Syed Asil Barakbah J and Wan Hamzah SCJJ, http://www.malaysianbar.org.my/selected_judgements/attorney_general_ors_v_arthur_lee_meng_kuang_1986_sc.html) where Mohamed Azmi SCJ (in delivering the Judgment of the Court) said:

"Although in ***McLeod v St Aubyn*** *[1899] AC 549, 561 in delivering the judgment of the court, Lord Morris observed that in England, "Committals for contempt of Court by scandalising the Court itself have become obsolete," the observation was disapproved the following year in* ***Reg v Gray*** *[1900] 2 QB 36, 40 where Lord Russell said:*

> *"Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court [and]… belongs to the category which Lord Hardwicke L.C. characterised as 'scandalising a Court or a judge." [**In re Read and Huggonson** (1742) 2 Atk 469]."*

*Be that as it may, Lord Morris's ruling that in other countries "the enforcement in proper cases of committal for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court" is cited with approval in **Ambard v Attorney General for Trinidad and Tobago** [1936] AC 322, 335. In this country, the need to protect the dignity and integrity of the Supreme Court and the High Court is recognised by … the Federal Constitution and also by … the Courts of Judicature Act 1964. **A proper balance must therefore be struck between the right of speech and expression** as provided for in … the Federal Constitution **and the need to protect the dignity and integrity of the Superior Courts in the interest of maintaining public confidence in the Judiciary.** On criticism of the court's judgment, we find the law has been well stated by Salmon L.J. in **Regina v Commissioner of Police of the Metropolis, Ex parte Blackburn (No 2)** (supra):*

> *"… **providing it keeps within the limits of reasonable courtesy and good faith**."*

Whether a criticism is within the limits of reasonable courtesy and good faith must in our view, depend on the facts of each particular case. In determining the limit of reasonable courtesy the court should not however lose sight of local conditions …"
[My emphasis]

[16] In ***Brahma Prakash Sharma and Ors v State of Uttar Pradesh*** AIR 1954 SC 10, Mukherjea J speaking on behalf of the Supreme Court of India said at p. 14:

> *"The position therefore is that a defamatory attack on a judge may be a libel so far as the judge is concerned and it would be open to him [or her] to proceed against the libellor in a proper action if he [or she] so chooses. **If, however, the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such court, it can be punished summarily as contempt**. One is a wrong done to the judge personally while the other is a wrong done to the public. It will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the*

court's administration of justice, or if it is likely to cause embarrassment in the mind of the judge himself [or herself] in the discharge of his [or her] judicial duties. ***It is well-established that it is not necessary to prove affirmatively that there has been an actual interference with the administration of justice by reason of such defamatory statement; it is enough if it is likely, or tends in any way, to interfere with the proper administration of law.****"*

[17] One of the more detailed and earlier judgments from the common law world setting out the law on contempt by scandalising a court or judge was a single judgment by Evatt J in the High Court of Australia in ***R v Fletcher; Ex parte Kisch*** (1935)52 CLR 248 wherein he described "the legal position" thus:

> *"(1) The High Court has ample jurisdiction to punish summarily those responsible for publications calculated to obstruct or interfere with the administration of justice, whether such publications take the form of comment referring to proceedings pending in the Court or that of unjustified attacks upon the members of the Court in their public capacity (**Porter v. The King; Ex parte Yee** (1926) 37 CLR 432 at p. 443 per* Isaacs *J) …;*
> *(2) In the case of attacks upon the Court or its members, the summary remedy of fine or imprisonment is applied only where the Court is satisfied that it is necessary in the interests of the ordered and fearless administration of justice and where the attacks are unwarrantable (**Bell v Stewart** (1920) 28 CLR 419 at p. 429, per Isaacs* and *Rich* JJ);
> *(3) All the recent decisions show that it is the duty of the Court to protect the public against every attempt to overawe or intimidate the Court by insult or defamation, or to deter actual and prospective litigants from complete reliance upon the Court's administration of* justice (***In re Sarbadhicary*** *(1906) 23 TLR 180 at p. 182*; ***R v Gray*** *(supra) at 40*; *…; and* ***R v Editor of the New Statesman*****; *Ex parte Director of Public Prosecutions** (1928) 44 TLR 301…);*
> *(4) Fair criticism of the decisions of the Court is not only lawful, but regarded as being for the public good; but the facts forming the basis of the criticism must be accurately stated, and* ***the criticism must be fair and not distorted by malice*** *(**R v Nicholls** (1911) 12 CLR 280 at p. 286);*
> *(5) Even although the criticism exceeds the bounds of fair comment so that other remedies of a civil or criminal nature are or may be available, the Court will not apply the summary remedy unless upon the principles stated above;*
> *(6) In all cases of contempt, the Court has power to act not only summarily but ex mero motu … This power is essential in the case of the High Court before which the Governments … are frequent litigants ....*

In Skipworth's Case (1873) LR 9 QB 230 the Attorney-General proceeded against the respondent at the request of the Court, and "as the representative of the profession" (per Cockburn L.C., *Kenealy's Trial of Tichborne, introductory vol., p. 240 …*
(7) Summary proceedings for contempt are criminal in character, and the respondents are therefore entitled to invoke the principle that ***guilt should be proved beyond reasonable doubt****."*

[18] In the Fiji Islands, section 30 of the Constitution sets out the right to "freedom of expression" as follows:

> *"(1) Every person has the right to freedom of speech and expression, including:*
> *(a) freedom to seek, receive and impart information and ideas; and*
> *(b) freedom of the press and other media.*
>
> ***(2) A law may limit, or may authorise the limitation of, the right to freedom of expression in the interests of****:*
> *…*
> ***(e) maintaining the authority and independence of the courts …***
>
> *but only to the extent that the limitation is reasonable and justifiable in a free and democratic society.*

Further, section 124 of the Constitution confirms the power of the courts to punish for contempt as follows:

> *"The Supreme Court, the Court of Appeal and the High Court have power to punish persons for a contempt of court in accordance with the law."*

[19] In addition, in the exercise of the powers conferred upon the Chief Justice by Section 25 of the *Supreme Court Act* [Cap 13], the current *High Court Rules* came into force on the 31st day of March 1988. Order 52 rule 1 of the High Court Rules gives the Court power of committal for contempt of Court as follows:

> *"(1) The power of the High Court to punish for contempt of court may be exercised by an order of committal.*
>
> *(2) This Order applies to contempt of court –*
> *(a) committed in connection with -*
> *(i) any proceedings before the Court ...*
>
> *(b) committed otherwise than in connection with any proceedings.*
>
> *(3) An order of committal may be made by a single judge."*

[20] Further, Section 2 of the *Penal Code* [Cap. 17] states:

> *"**2.** Except as hereinafter expressly provided **nothing in this Code shall affect …***
>
> ***(c) the power of any court to punish a person for contempt of such court;***

In addition, Section 136 of the *Penal Code* lists the following *"Offences relating to judicial proceedings":*

> *"**136**.-(1) Any person who …*
>
> *(h) while a judicial proceeding is pending, makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person in favour of or against any parties to such proceeding, or calculated to lower the authority of any person before whom such proceeding is being had or taken; or…*
> *(m) commits any other act of intentional disrespect to any judicial proceeding, or to any person before whom such proceeding is being had or taken,*
>
> ***is guilty of an offence, and is liable to imprisonment for three months*** *….*
>
> *(3) The provisions of this section shall be deemed to be in addition to and not in derogation from the power of the Supreme Court to punish for contempt of court."* [My emphasis]

[21] Thus whether in the Courts of England and Wales or those of the developing Commonwealth over the past 100 years in countries as diverse as Australia, India, Malaysia, the Caribbean and the Fiji Islands, the common law offence of contempt by "scandalising a Court or a judge", has been well recognised each citing with approval the above passage of Lord Russell in ***Reg v Gray***. Indeed, it has been referred to as the "classic statement of the offence" (see Nick O'Neill, Simon Rice and Roger Douglas, ***Retreat from Injustice***: ***Human Rights in Australia***, The Federation Press, Sydney, 2nd edn, 2004, p. 432) and where the authors have noted that it "was cited with approval by the

Privy Council hearing an appeal from Mauritius: ***Badry v DPP*** [1983] 2 AC 297".

[22] It should be noted that Lord Russell in ***Gray's case*** went to qualify in the same judgment (at page 40) the offence of "contempt by scandalising a court or judge" as follows:

> *"That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable arguments or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and which such an object is published;* ***but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen****."* (My emphasis)

[23] Unfortunately, the case report from ***Gray's case*** does not actually reprint either in part or in full the offending article from the *Birmingham Daily Argus* which was held to be in contempt. It has been set out in full, however, as cited by Law Reform Commission of Ireland in its 1991 "Consultation Paper on Contempt of Court" as an example of the *"distinction between scurrilous abuse of a judge, jury or court' on the one hand, and 'imputations of judicial corruption or bias', on the other"* (see Law Reform Commission of Ireland, "Consultation Paper on Contempt of Court", Dublin, 1991, p. 44; http://www.lawreform.ie/publications/data/volume9/lrc_64.html; and as set out in the table below). As for an example of the latter, that is, "imputations of judicial corruption or bias", the Law Reform Commission of Ireland noted at p. 49:

> *"An important English decision involving a more discreetly worded attack on a judge in* ***New Statesman (Editor), ex p DPP*** *[Times LR vol. XLIV, 1927-1928, 301 (Friday, March 2, 1928)] where the defendant suggested that Avory J, who was a Catholic, had allowed his religious beliefs to prejudice his summing up in a libel trial brought by Dr Marie Stopes, an advocate of contraception and abortion."*

As the summary in the table below notes, the Court accepted in the ***New Statesman case*** that the article imputed unfairness and impartiality; however, it also accepted that it was written in haste, the unreserved apology, and that

this was not then intention of the writer, noting that if it had been so found, then the Court was of the view that "*the only proper course would have been to commit him to prison"*. The editor was ordered to pay the whole of the costs of the proceedings as between solicitor and client (i.e. indemnity costs) (see case report at p. 303).

[24] An extract of the offending article from ***Gray's case*** has also been cited by O'Neill, Rice and Douglas (supra at p. 432), noting that the newspaper had described a judge as an "impudent little man in horse hair" and a "microcosm of conceit and empty headedness" for his ruling in a case whereby the press were ordered not to report details concerning an obscenity trial. Although the editor apologised for what had been published, he was still convicted and fined UK£100 pounds with UK£25 pounds court costs and bound over to prison until those amounts were paid.

[25] O'Neill, Rice and Douglas have also noted (supra at p. 432) that the "classic statement of the offence" by Lord Russell in ***Gray's case*** is somewhat balanced by the "classic statement of the rights of individuals and the media to criticise courts and judges" from Lord Atkin in the Privy Council case of ***Ambard v Attorney General for Trinidad and Tobago*** [1936] AC 322 at 335 that "*Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and the respectful, even though outspoken, comments of ordinary men* [and women]". They have also raised concerns, however, as to the offence generally (supra p. 437):

> *"For most contempt of court offences there are no clearly established elements of the offence and no maximum penalties. Few contempt of court offences are set down in legislation and the procedures dealing with these charges are many and variable. Whether the normal limitations and powers of sentencing first offenders apply is also an open question. In England, it was held that the normal statutory barriers to imprisoning first offenders did not apply to those convicted of contempt in the face of the court:* ***Morris v Crown Office*** *[1970] 2 QB 114".*

[26] Similar academic concern regarding the imprecise nature of the offence was expressed more recently by Oyiela Litaba, Senior Lecturer in Law at Monash University, Australia, writing in the *Deakin Law Review* in 2003 (having

previously taught at the University of the South Pacific based in Suva from 1997-2000) when she argued:

> *"The little known offence of contempt of court by scandalising ('scandalising') is the means by which the judiciary deals with publications that have, in its view, a tendency to undermine public confidence in the administration of justice. Implicit in this form of contempt is the idea that such publications interfere with the administration of justice as a continuing process.* ***Prosecutions for scandalising will generally relate to recently completed rather than pending litigation****. Where the publication relates to pending litigation, any charges brought are likely to fit more readily under one of the other forms of contempt (e.g. contempt in the face of a superior court, statutory provisions relating to contempt in the face of an inferior Court, or the sub judice rule, including the offence of prejudgment.)*
>
> *The offence takes on particular significance when judges make rulings on the controversial issues of the day. It has the potential to stifle or 'chill' discussion; either explicitly through overt threats of prosecution or covertly, by bringing about a culture of self-censorship or inappropriate deference. The scope for such self-censorship is increased by the fact that the scandalising jurisdiction lacks clear parameters."*

(See O. Litaba, 'Does the "Offence" of Contempt by Scandalising the Court have a Valid Place in the Law of Modern Day Australia?", [2003] *Deakin Law Review* 6; Austlii: http://www.austlii.edu.au/au/journals/DeakinLRev/2003/6.html#fn1)

[27] The question as to whether the law in relation to contempt needs "reform" has also been the subject of referral to various law reform commissions. The answer is not so simple as described by Judge Mary Kotsonouris in 2001 reviewing the recommendations of the 1994 report by the Law Reform Commission of Ireland:

> *"It is difficult to summarise the recommendations even in the specific area of scandalising the court and, moreover, there was not unanimity between the five members including the President, a former Supreme Court Judge. Very briefly indeed, they were that the offence of 'scandalising the court' should be defined by statute for prosecution purposes, and should consist of imputing corrupt conduct to a judge or publishing a false account of court proceedings,* ***the person must know there was a substantial risk - or be recklessly indifferent to the risk - that publication would bring the administration of justice into disrepute, or that there was an***

> ***intention to publish a false account***. *The truth of the communication would render it lawful, there should be no legislative interference with the court's power of summary attachment and that abuse of the judiciary, even if scurrilous, should not constitute an offence. There has been no move as yet to introduce laws giving form to these or any other of the proposals."*

(see "Criticising judges in Ireland", ***Judicial Studies Institute Journal***, vol.2, no.1, 2001, pp. 79-97, Judicial Studies Institute, Ireland, at p. 91, http://www.jsijournal.ie/html/Volume%202%20No.%201/2%5B1%5D_Kotsonouris_Criticising%20Judges%20in%20Ireland.pdf)

[28] Questions concerning the status of the offence and penalty were also raised in Hong Kong in ***The Secretary for Justice v Oriental Press Group Ltd & Ors*** HCMP 407/1998 (Judgment 23 June 1998) and; HCMP407A/1998 (Sentence 30 June 1998). It has also been the subject of some strident criticism. Professor Tim Hamlett of Hong Kong Baptist University noted in the *AsiaPacific Media Educator* in 2001 (at pp. 20, 21 and 25) that not only was it the first case for such a contempt ever prosecuted in Hong Kong and although *"prosecutions are extremely rare"* in most common law countries with some not having taken place for decades, it was *"a particular peril for media whose governments seek to combine a tight rein on reporting and comment with traditional legal appearances"*. Whilst also acknowledging that in the ***Oriental Press case*** *"some surprising people later admitted having pressed for a prosecution including the local branch of the Human Rights Monitor … and a leading democrat and former journalist …",* Hamlett concluded arguing:

> *"The offence of scandalising the court is in this writer's view an anachronism. It is so regarded in North America and probably in the UK as well. Many have called for its abolition … Some of them wish for a less objectionable offence … The offence remains a serious hazard for the media in Asia-Pacific countries with a Common Law background. The danger is particularly acute in those countries where freedom of the press is unloved …* ***But in this case it is generally, though not universally accepted that there must be limits and the ODN's conduct [Oriental Daily News] placed it outside them****."*

(See "Scandalising the scumbags: The Secretary for Justice vs the Oriental Press Group", *AsiaPacific Media Educator*, Issue No.11, July-December 2001, Article 3, pp. 20-31, http://www.uow.edu.au/content/groups/public/@web/@crearts/documents/doc/uow036230.pdf)

[29] In relation to the Fiji Islands, as noted earlier, for the offence of contempt by scandalising a court or judge there are two relevant cases: ***Parmanandam v Attorney-General*** (supra) from 1972; and ***Chaudhary v Attorney-General*** (supra) from 1999. In both cases the Fiji Court of Appeal confirmed the common law offence had continued under the 1970 and 1990 Constitutions and is recognised as part of the armoury of the High Court in the *High Court Rules*.

[30] In ***Parmanandam***, *"the material relied upon as constituting the contempt was contained in a speech made by the appellant at a political meeting at the Suva Civic Centre"* to the National Federation Party and subsequently published in a distributed pamphlet. The text of the speech was lengthy with some of the significant parts being as follows:-

> *"... This attack is being made on the NFP platform* ***to clean the judiciary once and for all*** *so that in future there would be no need for any further attacks on the judiciary ...*
>
> *The Alliance government, through the legal and judicial services commission, has completely disregarded the majority opinion of the practicing solicitors of Fiji.* ***There is a rule*** *ladies and gentlemen, a rule, an unwritten rule practiced in commonwealth countries, that is countries using English law,* ***that once a magistrate always a magistrate****. This principle has been evolved* ***so that there may not be occasions created by which any particular magistrate at any particular time fall into sacrificing a principle or a rule, or a particular rule of law, for the sake of expediency or for the sake of promotion****.* ***Yet all magistrates in this country are put into this position almost every day****. And that is the state of your halls of justice under the Alliance Government of Fiji.*
>
> *Not so long ago you will recall that my friend Mr. K. C Ramrakha led an attack on the proposed, or the then proposed appointment of the present Chief Justice, Chief Justice Sir John Nimmo. You will recall that there was requisitioned a special general meeting of the law society wherein 17 lawyers were against this proposed appointment ...*

Despite this, ladies and gentlemen, the Alliance Government went ahead with the appointment. This particular gentleman, Sir John Nimmo, an Australian, who was appointed Chief Justice of Fiji, ***you will recall his salary, or part of his salary, is paid by the Australian Government. Now where is our independence?*** *Have we sold our independence for a few measly thousand dollars to Australia? This is the position ladies and gentlemen, under the present Alliance Government.*

Now, ladies and gentlemen, ***there is a very cherished principle in English law and British tradition that a man must not be condemned without his hearing, that a man must be given his right to be heard. Yet the very same Chief Justice, Sir John Nimmo condemned recently two Suva lawyers who were not even present, who were not even charged.*** *This is a Chief Justice acting under the Alliance Government.* ***When your very throne of the judiciary, the base of the judiciary, acts in such a manner then the whole judiciary seems, or gives the impression, that it is cracking up****. It is akin somewhat to the commencement of the decline and fall of the Greece-Roman empire. And what have you? At present we have sitting today in Fiji a Fiji Court of Appeal the president of which is the Chief Justice, Sir John Nimmo … Now you have three judges sitting, two of them are appointed from judges sitting, two of them are appointed from New Zealand. They are also retired judges. Yet they brought over by the Chief Justice of Fiji who is president of the court of appeal.* ***Their future appointments in sessions depend entirely upon him.*** *What is the position when a judgment of his goes up to be decided by these gentlemen from New Zealand or locally retired judges.*

These all gentlemen are different aspects of the judiciary which needs cleaning up. And if you vote NFP into power, judiciary will be cleaned up once and for all.*"*

[31] As the Court of Appeal noted, the text in the pamphlet read:

"IT WAS UNDER
<u>THE ALLIANCE</u>
GOVERNMENT THAT ***TWO SUVA LAWYERS WERE CONDEMNED IN ABSENTIA IN A COURT OF LAW****.*

<u>VOTE FEDERATION</u>
FOR THE PROTECTION OF YOUR
FUNDAMENTAL HUMAN RIGHTS"

And then there was printed at the bottom the following:

> *"Authorised and Published by Viyaya Parmanandam of 50 Beach Road, Laucala Bay for an on Behalf of the National Federation Party."* [My emphasis]

[32] While the matter was awaiting Appeal, Grant J delivered the following Ruling (see ***In re Parmanandam - ruling*** (Unreported, No.90 of 1972, 9 May 1972, Grant J; Paclii: [1972] FJSC 1; No 90 of 1972 (9 May 1972):

> "*I am in no doubt that a contempt of Court consisting of scandalising the Court is a criminal contempt as distinct from a civil contempt and that the Order of the Full Court amounts to a conviction of the Applicant (**R. v. Gray** (1900) 2 Q. B. 36: **Izuora v. Reg.** (1953) A. C. 327).*
>
> *The procedure for moving the Court to deal with that offence was indeed a civil one, namely O. 52 R. 1 of the Rules of the Supreme Court of Fiji; and to the extent that the procedure adopted was civil in nature but the contempt committed criminal in nature the matter may be described as hybrid."*

[33] In the judgment of Gould VP delivered on behalf of the Court of Appeal in ***Parmanandam***, it was said of the contempt:

> *"…There was a clear imputation that the Chief Justice had disregarded basic and elementary principles of justice. It was an imputation both false and particularly when coming from an officer of the Court, unworthy. In its judgment now under appeal the Supreme Court pointed out, quoting **R. v. Dunbabin; Exparte Williams** (1935) [52 CLR 248] that **the power to punish for contempt is not for the personal vindication of the judges; the real offence is the wrong done to the public by weakening the authority and influence of a tribunal which exists for the public good alone**. It referred also to the difference between freedom of speech and licence, pointing out that **while it is open to all to criticise the administration of justice temperately and fairly, criticism which is actuated by malice or which imputes improper motives to those taking part or which is calculated to bring a court or judge into contempt or lower his authority, cannot shelter behind the bulwark of free speech**. We repeat these portions of the judgment under appeal not only because we agree with them, but because they are well worthy of repetition. The Supreme Court, having pointed the deliberately planned nature of the attack, and considered the terms of the speech and content of the pamphlet, concluded that … because **the matter published aimed at lowering the authority of the Courts and excited misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office**. The Court took its words from the judgment of Rich J. in **R. v. Dunbabin Ex parte Williams** (supra) at p. 442 …*

> *Mr Koya's main ground on the merits of the matter was that speech and pamphlet were within the limits of criticism allowed in the interests of the right of free speech. He relied upon the judgments of the Court of Appeal in* ***R. v. Metropolitan Police Commissioner Ex parte Blackburn*** *… With these statements of course we respectfully agree.* ***Every such criticism however, must be judged upon its own content; and in our opinion the language used by the appellant went far deeper than mere criticism of a judgment, and was markedly lacking in the elements of courtesy and good faith mentioned by Salmon L.J.*** *Mr Koya referred also to an affidavit by the respondent in which he said (inter alia) that he honestly believed that his words were a fair comment … As to this, the matter complained of must be construed, as Mr. Koya admits, objectively and as a whole.* ***The test is what any fair minded and reasonable man would understand from the speech and pamphlet, and we are satisfied that a construction so arrived at fully supports the finding of the Supreme Court that this went beyond fair criticism and amounted to a gross contempt****."* [My emphasis]

[34] In ***Chaudhary***, the contempt involved the Secretary-General of the Fiji Labour Party who had prepared a 30 page report for their 1997 Annual Conference a section of which dealt with "Law and Order", wherein it was stated:

> "*There has been public suspicion since the coups* ***that many in our judicial system are corrupt****.* ***In several cases well known lawyers have been identified as receiving agents for magistrates and judges****. A number of lawyers are known to arrange for them to appear before their preferred magistrates or judges."*

(See judgment in High Court: ***In re Mahendra Pal Chaudhary*** (Unreported, High Court of Fiji, HBM0003J of 1998, 7 April 1998, Fatiaki J; Paclii: [1998] FJHC 44; http://www.paclii.org/fj/cases/FJHC/1998/44.html); see also judgment of Court of Appeal, Paclii, page 2).

[35] According to Fatiaki J who heard the committal proceedings in the High Court of Fiji:

> *"The words deliberately chosen and used by the respondent were intemperate and inflammatory, and the context in which they occur in 'the report' only serves to highlight their wanton and gratuitous tone and satisfies me beyond a reasonable doubt* ***that they constitute a 'technical contempt' of this Court*** *in scandalising the Court by unfairly, improperly and indiscriminately imputing to unnamed members of the Court the commission of serious criminal offences in the performance of their judicial functions."* [My emphasis]

[36] As the Fiji Court of Appeal noted:

> "*The affidavit of Kamal Iyer, a journalist (which was not challenged by cross-examination) established that the appellant, as Secretary-General of the Labour Party, presented the pamphlet to a meeting of party delegates on 11 July 1997 and it was distributed to journalists and news media…*
>
> *In spite of Mr Naidu's submissions (for Mr Chaudhary) in support of the ground of appeal alleging* ***that publication of the report*** *by the appellant had not been proved to the required standard of beyond reasonable doubt,* ***we are satisfied that this was clearly established on the evidence*** *…*
>
> *… the common-law offence of contempt scandalising the Court involves attacks upon the integrity or impartiality of judges or Courts,* ***the mischief aimed at being a real risk of undermining public confidence in the administration of justice, which must be established beyond reasonable doub****t (See* ***Solicitor-General v Radio Avon Ltd*** *[1978] 1 NZLR 225 at p234). We accept that in respect of such attacks, a defence is available of honest and fair comment on the basis of facts truly stated, and of justification or truth. Mr Chaudhary did not invoke either by way of defence, and we consider his counsel's concession that his remarks amounted to contempt on purely common-law principles was rightly made …*
>
> *In Fiji, s13(2)(b) of the [1990] Constitution affords explicit protection to laws aimed at maintaining the authority and independence of the courts, and the qualification about reasonable justification at the end must be interpreted with this in mind …*
>
> *The 'real risk' test may exonerate angry outbursts by disappointed litigants or their counsel … since reasonable people would understand them for what they were and would not treat them seriously; indeed this point was made by Judges in that case. There may also be room by analogy with the defence of fair comment for the voicing of genuine suspicions about judicial misconduct in the absence of hard evidence. This may be for the wider public benefit by signalling the need for open debate and enquiry, which are the hall-marks of a truly democratic society. In the long run it cannot be good for the administration of justice for such misgivings to be repressed, especially if they are felt by responsible citizens.* ***However, Mr Chaudhary's statement went far beyond the voicing of mere suspicions. We are satisfied that his considered and unsubstantiated allegations of corruption were serious enough to constitute a real risk to the authority and independence of the Courts, and we agree with Fatiaki J that the charge against him was proved****."* [My emphasis]

[37] Before moving to the law on penalty for this form of contempt, I hope that the above has provided a useful summary to assist all citizens of the Fiji Islands, including members of the legal profession, the media, politicians, academic and other commentators who may have been in doubt as to what is the law in this country on contempt by way of "scandalising a Court or a judge" so that it cannot be said for any offences which may arise in the immediate future that there was some ambiguity or misunderstanding as to the legal position. If in doubt, perhaps a useful guide has been provided by the High Court of Hong Kong, Court of First Instance, in its headnote to ***The Secretary for Justice v The Oriental Press Group Limited and Ors*** (High Court of Hong Kong, Court of First Instance, Miscellaneous Proceedings No.407 of 1998, Chan CJHC and Keith J) which was the first recorded case in Hong Kong of proceedings for contempt by way of scandalising a court or judge it summarised the law as follows (and which is an equally applicable summary as to the general current state of the law in the Fiji Islands):

> *"(1) A person, firm or company cannot be convicted of the criminal offences of scandalising the court or interfering with the administration of justice unless* ***the facts establish beyond a reasonable doubt that there was a real risk****, as opposed to a remote possibility,* ***that the acts complained of would undermine public confidence*** *in the due administration of justice in the minds of at least some of the persons who were likely to become aware of the acts complained of.*
>
> *(2) The offences of scandalising the court and interfering with the administration of justice do not require proof that the alleged contemnor intended to undermine public confidence in the due administration of justice.* ***It is sufficient if he [or she] intended to do the acts which are said to constitute the contempt****.*
>
> *(3) Upon the assumption that making the scandalising of the court a criminal offence amounts to a restriction on the right of freedom of expression, that restriction was*
> *(a) for the protection of "public order (ordre public)" within the meaning of Art. 16(3)(b) of the Bill of Rights because it was for the protection of the rule of law to the extent that the rule of law is eroded if public confidence in the due administration of justice is undermined, and*
> *(b) necessary for the achievement of that objective.*
> *Accordingly, the criminal offence of scandalising the court has not been abolished or modified by the Bill of Rights."* [My emphasis]

C. THE PENALTIES FOR CONTEMPT IN RELATION TO SCANDALISING A COURT OR JUDGE

1. Previous penalties imposed in the Fiji Islands

[38] As for the appropriate penalty to be considered for this type of offence, the Fiji Court of Appeal in ***Parmanandam*** (supra) noted that the contemnor "*was committed to prison for six months and ordered to pay the costs of the proceedings"* which his Counsel argued was excessive referring by way of contrast to cases where fines had instead been imposed. He also referred to the then section 128 of the *Penal Code* (now section 136) which provided for a maximum of three months' imprisonment for contempt. As the Court of Appeal noted:

> "*It is difficult to draw very much from sentences imposed in other cases, as no set of facts completely parallels another and the gravity of a contempt must be estimated in its own context.* ***Mr. Koya makes a valid point however in referring to the maximum punishment of three months' imprisonment in contempt proceedings under the Penal Code, even though it may be that the intention of the legislature was to bring minor cases within magisterial jurisdiction*** *…*
>
> *We take the view that the punishment of six months imprisonment imposed … was a heavy one. The appropriate punishment for contempt of this type is difficult to assess and we do not say that the committal was manifestly for too long a period. Having regard, however, to our own view that we would have been inclined to impose a somewhat shorter term, and giving such weight as we can to the apology now tendered, we think it appropriate to effect a reduction of the sentence by setting aside the order for committal for six months and substituting an order for committal of three months, to run from the commencement of the original order. The order for costs made … will stand."* [My emphasis]

[39] ***In re Mahendra Pal Chaudhary*** (Unreported, High Court of Fiji, HBM0003J of 1998, 7 April 1998, Fatiaki J; Paclii: [1998] FJHC 44; http://www.paclii.org/fj/cases/FJHC/1998/44.html) which was confirmed by the Fiji Court of Appeal, the Respondent was found guilty of contempt and ordered to pay within seven days the costs of the proceedings fixed at $500.00.

[40] Thus in Fiji, at one end of the scale a penalty of six months' imprisonment was imposed in ***Parmanandam*** reduced to three months by the Court of

Appeal with the notation that: "*It is difficult to draw very much from sentences imposed in other cases, as no set of facts completely parallels another and the gravity of a contempt must be estimated in its own context."* At the other end of the scale, a penalty was imposed in ***Chaudhary*** for him to pay within seven days the costs of the proceedings fixed at $500 and this penalty was confirmed by the Court of Appeal. One might also observe that perhaps the difference in penalties reflected the Courts' views as to the allegations made and the methods of publication and circulation.

2. Previous penalties imposed from some other common law jurisdictions

[41] The Court notes that a number of cases from other jurisdictions were brought to its attention by both Counsel. Some of the cases cited were on contempt generally and some specifically on contempt by scandalising a court or a judge. A "Short Summary of Relevant Cases" on contempt was helpfully provided by Counsel for the Respondents in table form. Some of those cases, in particular, dealing with contempt by scandalising a court or a judge have been included in the table below (along with those cited by Counsel for the Applicant as well as some other cases located by the Court):

Fiji Islands

Parmanandam v Attorney-General (1972) 18 FLR 90	The material constituting the contempt was contained in a lengthy speech made at a political meeting, part of which was subsequently published in a pamphlet alleging: "*the NFP platform[is] to clean the judiciary once and for all",* magistrates were being appointed as Judges which called into question whether they may be *"sacrificing a principle or a rule, or a particular rule of law, for the sake of expediency or for the sake of promotion",* questioning the appointment of an Australian as Chief Justice with his position being paid by the Australian government and how this reflected upon Fiji's independence, questioning appointments to the Court of Appeal when *"their future appointments in sessions depend entirely upon" the Chief Justice,* and that "*TWO SUVA LAWYERS WERE CONDEMNED IN ABSENTIA IN A COURT OF LAW" by the Chief Justice* which the Court of Appeal found *"was a clear imputation that the Chief Justice had disregarded basic and elementary principles of justice"* and was imputation that was false. Issued qualified apologies.	Six months' imprisonment reduced to three months by Fiji Court of Appeal

Chaudhary v Attorney-General (1999) 45 FLR 87	"*There has been public suspicion since the coups that many in our judicial system are corrupt. In several cases well known lawyers have been identified as receiving agents for magistrates and judges. A number of lawyers are known to arrange for them to appear before their preferred magistrates or judges."*	Court costs to be paid within 7 days fixed at FJ$500

United Kingdom

R v Gray [1900] 2 QB 36	The *Birmingham Daily Argus* described a judge for his ruling in a case thus: *"The terrors of Mr Justice Darling will not trouble the Birmingham reporters very much. No newspaper can exist except upon its merits, a condition from which the Bench, happily for Mr Justice Darling, is exempt. There is not a journalist in Birmingham who has anything to learn from the impudent little man in horsehair, a microcosm of conceit and empty headedness, who admonished the Press yesterday."* [As cited by Law Reform Commission of Ireland, "Consultation Paper on Contempt of Court", Dublin, 1991, p. 45] Editor apologised.	Editor fined UK£100 pounds with UK£25 pounds court costs and bound over to prison until those amounts were paid
R v Editor of the New Statesman; Ex parte Director of Public Prosecutions (1928) 44 TLR 301	A Dr Stopes had found her advertisements in the *Morning Post* suddenly stopped and wrote to the owner suggesting *"that Roman Catholic influence was at work"*. The owner passed it on to the editor who commenced a libel action against Dr Stopes in which he was successful. The editor of the *New Statesman* suggested that the verdict was "*a substantial miscarriage of justice"* and that *" prejudice … ought not to be allowed to influence a court of justice in the manner in which they appeared to influence Mr Justice Avory in his summing-up"*, *"… an individual owning to such views [in favour of contraception and abortion] … cannot hope for a fair hearing in a Court presided over by Mr Justice Avory [a Catholic] – and there are many Avorys"*. Editor apologised to the judge and the court.	The Court accepted that the article imputed unfairness and impartiality; however, it also accepted (on penalty) that it was written in haste, the unreserved apology and it was not the intention of the writer to scandalise, noting that if it had been found by the Court otherwise then the Court was of the view that "*the only proper course would have been to commit him to prison"* . The editor was ordered to pay the whole of the costs of the proceedings as between solicitor and client (i.e. indemnity costs)

Privy Council

In re Sarbadhicary *(1906) 23 TLR 180*	Counsel published an article in a periodical newspaper the *Cochrane* which was libellous of the Chief Justice for his ruling in a case as well as other judges of the High Court at Allahabad such as: *"he punishes not the wrongdoer, but the wronged, and thus he*	Appeal from the High Court at Allahabad suspending him from practising as an advocate in that Court for four years.

	upholds justice", needs help from other judges who correct his judgments, not *"as independent as his predecessors"*, "*thus helped as he is, he must give help when it is necessary"*, "*so we can say, without fear of contradiction, that our Honourable Chief Justice is not an independent man", "one might be impressed with the idea that he has never received any legal education, "he has shown that he is not at all a lawyer, and a Judge not qualified enough".* Apologised.	Appeal to Privy Council dismissed finding "reasonable cause" for the order made and also noting that it might have been dealt with by the High Court in a summary manner, by fine or imprisonment, or both.

New Zealand

Re Wiseman [1969] NZLR 55	A Solicitor said, among other things, in affidavits that: *"one of the judges [of the NZ Supreme Court] should be removed from office for misconduct".* No genuine effort to purge his contempt or withdraw the scandalous statements.	Imprisonment for three months plus NZ$100 costs
Solicitor-General v Radio Avon Ltd [1978] 1 NZLR 225	A radio news item said that a judge was *"at the centre of another closed court controversy".* Radio apologised.	Fine NZ$500 upheld against the person who did first broadcast; NZ$200 fine overturned for news editor who immediately issued an apology

Papua New Guinea

Public Prosecutor v Rooney (No 2) [1979] PNGLR 448	Three charges of contempt of the Minister for Justice , one involving "sub judice" contempt by way of letter to the Chief Justice (which was copied widely to about 45 others) , the other two that what the defendant said to the media scandalised the court: *"that she had no confidence in the Chief Justice and the other judges", "that the foreign judges on the bench are only interested in administration of foreign laws, and not the feelings and aspirations of the Nation's political leaders", "that she would not retract what she had said because the judiciary is no longer doing justice"* Later apologised.	Imprisonment of light labour for eight months

Australia

R. v. Dunbabin Exparte Williams *(1935) 52 CLR 248*	An application to punish both the editor and the *Sun* newspaper where an article alluded to two decisions given by the Court saying, for example, of the Court: deciding *"to the horror of everybody except the Little Brothers of the Soviet and kindred intelligentsia", "whether the ingenuity of five bewigged heads cannot discover another flaw",* the Court *"with that keen microscopic vision for splits in hairs which is the admiration of all laymen", "cry like the historic British monarch for some gallant champion to rid them of this pestilent Court",* as an alternative to getting rid of the Court it should be given some *"real work to do"* so that it should not have *"time to argue*	By majority 4:1: The company fined £200 and the editor fined £50. Respondents to pay the costs of the proceedings.

	for days and days on the exact length of the split in the hair."	
Gallagher v Durack (1983) 45 ALR 53	Trade unionist made statement suggesting that his successful appeal against an earlier imprisonment for contempt was due to union pressure.	Application for special leave to appal three months' imprisonment refused by High Court of Australia
DPP v Francis & Anor (No 2) (Unreported, Supreme Court of South Australia, 25 August 2006, Belby J; Austlii: [2006] SASC 261 – Reasons for Sentence)	Radio talkback host described a magistrate who was to consider bail once they had received a psychiatric report for an accused of a child pornography offence as "irresponsible", the Magistrate's face should be smashed in, *"It's the judge who should have a psychiatric examination, in my opinion*", *"The judge is as loony as the bloody guy himself*", *" the dirty, lousy, bloody judge, ... even thought about having bail for a person like this"* as well as several other similar statements. Charged with contempt for scandalising as well as attempting to prejudice or pervert the course of justice. Radio host and station both apologised.	The Court considered that the sentence for the radio talkback should be 3 months but reduced it to nine weeks' imprisonment suspended (due to his past record, contrition and this being a first offence) on basis of entering into a bond of $2000 to be of good behaviour for 18 months; The Court considered that the sentence for the employer radio station should be a fine of $60,000 but reduced this to fine of $45,000 due to its plea of guilty, apology and past record. In addition, the defendants were ordered to pay the costs of the DPP.

Hong Kong

The Secretary for Justice v Oriental Press Group Ltd & Ors HCMP 407/1998 (Judgment 23 June 1998) and; HCMP407A/1998 (Sentence 30 June 1998)	The newspaper which was involved in two legal proceedings which we on appeal: one for being convicted of publishing what was judged as an indecent photograph and the other where they were awarded what they perceived as insufficient damages for breach of copyright. They described the Judge in the copyright case: "*as ignorant, unreasonable, ridiculous, arbitrary, prejudicial and arrogant"* claiming persecution from the police and courts since 1995; it then ran a campaign over two weeks listing the names and addresses of all 157 members of the Obscene Articles Tribunal (OAT) who were described as *"scumbags", "dogs and bitches", "tortoises having retreated into their shells", "like a rat in a gutter", and "public enemy of freedom of the press and a public calamity" as well as a multi-page feature of inconsistent judgments on indecency"*. No prosecution ensued until the following further articles appeared referring to: *"the swinish white-skinned judges and the canine yellow-*	The editor was imprisoned for eight months reduced to four months (3 months for the scandalising and 3 months for the harassment of the judge of appeal with each offence to be served concurrently for one month); and the newspaper fined HK$5million.

	skinned tribunal", "Oriental does not care if you are yellow-skinned or white or a pig or a dog … We are determined to wipe you all out", as well as referring to specific judges as "Rogers' despicableness and Godfrey's derangement", further it claimed that the OAT *"is merely a tail-wagging dog outside the judiciary", "all … are stupid … who suffer from congenital mental retardation and have no common knowledge worth mentioning"* and so forth. As the Court of Appeal found at page 9: "*the meaning is clear … the Oriental Press Group was the target of a biased judiciary … The Oriental Press Group had destroyed the authority of the Obscene Articles tribunal and would now attack the judiciary in every possible way in order to destroy its authority"*. They also conducted a "paparazzi watch" for three days to follow the judge at first instance from the copyright damages case. The proceedings were both for contempt by scandalising as well as "interfering with the administration of justice as a continuing process" as both matters were still on appeal. The editor was found guilty on both counts, the newspaper just for the articles not the "paparazzi watch". [The text has been taken both from the case reports and also as cited in Tim Hamlett, Hong Kong Baptist University, "Scandalising the scumbags: The Secretary for Justice vs the Oriental Press Group", *AsiaPacific Media Educator*, Issue No.11, July-December 2001, Article 3]	

Singapore

Attorney-General v Chee Soon Juan [2006] SGHC 54	Contempt in face of the Court as well as by a publication scandalising the court given to media representatives and to 59 persons and organisations in Singapore and elsewhere, as well as on a website related to the Respondent, alleging: *that the Singapore judiciary was biased and unfair, acted at the instance of the Government in cases involving opposition politicians the latter suffering grave injustice because the Singapore judiciary was not independent in order to gain favour with the Government. In addition, it insinuated that judges were controlled by the Government and were removed from the Bench if they were perceived to be lenient towards opposition politicians.*	One day's imprisonment plus S$6,000 fine; as defaulted 8 days' imprisonment
Attorney-General v Hertzberg Daniel & Ors [2008] SGHC 218	The *Wall Street Journal Asia* published two articles and a letter to the editor which were NOT found to contain passages or words that expressly scandalised the judiciary but that they did so by implication as the Attorney-General's submissions summarised: *that the Singapore courts do not dispense justice fairly in cases involving political opponents and detractors of Minister Mentor Lee Kuan Yew*	The newspaper was fined S$25,000 to be paid within 7 days (had previously been fined S$4,000 in 1985 and S$6,000 in 1989)

	and other senior government figures, and the courts facilitate the suppression of political dissent or criticism in Singapore through the award of damages in defamation actions" Editor apologised.	

3. Aggravating and mitigating factors considered from some other common law jurisdictions

[42] I note that of the abovementioned cases, Counsel for the Respondent referred the Court particularly to the judgment of the Singapore High Court in ***Attorney-General v Hertzberg Daniel & Ors*** [2008] SGHC 218. He also cited in his written submissions and "case book" ***Re Kumar and Delaibatiki*** (1991) 37 FLR 90 where two of the daily newspapers in Fiji published the proceedings of a *voire dire,* that is "a trial within a trial", which caused a trial to be aborted resulting in the newspaper editors being ordered to pay the costs of the contempt proceedings set at $300.00. With respect to the otherwise extremely helpful submissions of Counsel for the Respondents, apart from ***Kumar and Delaibatiki*** being a contempt matter, I do not see how it has any relevance to the present proceedings where the Court is being asked to decide as to what sentences should be imposed for a far different form of contempt, that is, by scandalising a court of judge.

[43] As for the penalties imposed in ***Attorney-General v Hertzberg Daniel & Ors*** (supra), Tay Yong Kwang J held:

(a) That *"the allegations by way of insinuations clearly possess the inherent tendency to interfere with the administration of justice … would immediately cast doubts about the judiciary … and undermine public confidence, among … foreign or local readership in the even-handed administration of justice by our courts.* ***A judiciary which is not impartial and independent is as good as salt that has lost its flavour****";*

(b) That "the general sentencing principles" referred to in the Attorney-General's submissions *"are appropriate"*, they being: "… denunciation (to drive home the point that such behaviour is unacceptable), specific deterrence (to prevent a recurrence of such behaviour) and general deterrence (to signal to others that such behaviour will be dealt with severely)";

(c) That *"the factors that the court should have regard to in deciding the appropriate punishment are the nature of the contempt, who the contemnor is, the degree of culpability, how the contempt was published, the kind of publication and the extent of the publication"*;

(d) That *"other relevant considerations would be whether the respondent argued against culpability, expressed regret over his conduct or made an apology for his contempt of court"*;

(e) That the following aggravating factors are relevant –

(i) The publishing company (Dow Jones Publishing Company (Asia) Inc)*"is a repeat offender"* and *"even though the earlier instances of contempt were committed about two decades ago … that is not a very long period of time in the context of corporate history"*;

(ii) *"There were three offending publications in the span of three weeks … appearing in a respectable journal with a wide and sophisticated readership"*;

(iii) *"… the imputations"* are *"very serious in nature"* as "*impartiality and independence are the judiciary's crucial cornerstones"* and by *"putting these qualities into question destablizes the edifice of the rule of law and, consequently, threatens to bring down the reputation of our country"*;

(v) The publishing company *"has not offered any apology but has maintained throughout that the publications were not in contempt"*;

(h) That the following mitigating factors are relevant –

(i) To the credit of the publishing company *"it has published in full"* letters from Mr Lee's press secretary and the Ministry of Law in response to the publications (even though there is an argument that this just repeats the cycle of contempt);

(ii) Not all the words relied upon were in contempt;

(i) *"Although it is accepted that imprisonment and fine are two of the permissible sanctions (see O 52), no limit has been set for either one … Nonetheless, it is clear that the power to punish for contempt of court should be exercised reasonably"'*

(j)That *"the present case does warrant the imposition of a fine which will serve the twin functions of being a denunciation of the … [company's] conduct (especially with two past infractions), and, hopefully, of being a*

deterrence against future transgressions" such that the company was ordered *"to pay a fine of $25,000 … within 7 days"*.

[44] I also note recent judgment from Singapore which may be relevant: ***Attorney-General v Chee Soon Juan*** (Unreported, High Court of Singapore, No.OS 285/2006, 31 March 2006, Lai Siu Chiu J [2006] SGHC 54, http://www.asianlii.org/cgi-bin/disp.pl/sg/cases/SGHC/2006/54.html), where it was held at paragraphs 57-58:

> *"An offence of contempt is punishable with either a fine or imprisonment, and unlike a criminal offence, it is not subject to any limits on the duration of imprisonment or the amount of fine.* ***In deciding whether an act of contempt is serious enough to warrant imprisonment, two factors are determinative: first, the likely interference with the due administration of justice, and second, the culpability of the offender*** *(**R v Thomson Newspapers Ltd** [1968] 1 All ER 268 at 269).*
>
> *Sentences of imprisonment tend to be more common in cases which involve a blatant refusal to adhere to an order of court … In contrast, offences which involved scandalising the Singapore courts have generally been punished by fines only …*
>
> *The object of imposing the penalty for the offence of scandalising the court is* ***to ensure that the unwarranted statements made*** *by the contemnor about the court or the judge* ***are repelled and not repeated****:* ***Gallagher v Durack*** (supra)*."* [My emphasis]

[45] In ***Chee Soon Juan***, Lai Siu Chiu J found:

(a) That *"the Respondent's conduct leading up to the present proceedings was clearly reprehensible"*;

(b) That *"he was not contrite nor did he make any attempt to withdraw his offending remarks*";

(c) That *"he repeatedly maintained that he spoke the truth"*;

(d) That *"as the SSG had submitted, a jail sentence was necessary so as to deter the Respondent from repeating, and like-minded persons from committing, similar acts in future";*

(e) That a term of one day's imprisonment was imposed *"to serve as a warning to others who chose to go down the Respondent's path that,*

henceforth, similar offenders can expect to be incarcerated and perhaps fined as well *and, if the circumstances warranted it, sent to jail for longer periods too.* ***Fines as the penalty for contempt of court of this nature will no longer be the norm****";* [My emphasis]

(f) That in addition, the Respondent was fined but not to *"be a crippling sum which would render it well nigh impossible for him to pay so that, by default, he would inevitably serve extra time in prison"*. Thus a fine of S$6,000 was imposed *"using, as a yardstick, the fines imposed in previous cases of contempt proceedings … where the fines imposed on the defendant and other contemnors ranged from $5,000 to $10,000*". It was also ordered that "in default of payment of the fine" the Respondent was "to serve seven days" in prison, which is what ultimately occurred, making a total sentence of eight days' imprisonment.

[46] As to appropriateness of penalty, apart from the judgments cited above, the following helpful criteria were set out by the Papua New Guinea Supreme Court of Justice in ***Public Prosecutor v Nahau Rooney (No 2)*** [1979] PNGLR 448; Paclii: 11 September 1979, Raine DCJ, Saldanha, Wilson, and Greville Smith JJ; Kearney *diss*) http://www.paclii.org/pg/cases/PNGLR/1979/448.html). The main judgment was written by Wilson J who, after finding that "the defendant acted, in her then frame of mind, with deliberation" turned to the following considerations in relation to penalty:

(a) "*Where there is 'a deliberate attempt' to interfere with 'the due and ordinary methods of carrying out the law' and therefore a grave offence has been committed, so must the punishment be severe"*: ***Re Davies*** (1888) 21 QBD 236 at p. 238; and ***Onslow v Skipworth*** (1873) LR 9 QB 219; 230;

(b) *"The court's power to imprison is the major sanction which can be imposed for contempt of court.* ***It is exercised only where a serious contempt has been committed*** *… . In this context there is need to bear in mind the cautionary words of the judicial committee of the Privy Council in* ***McLeod v. St. Aubyn*** *[1899] AC 549 at p. 561*:

> *"(The power) is not to be used for the vindication of a judge as a person ... Committal for contempt of Court is a weapon to be used*

sparingly, and always with reference to the interests of the administration of justice."

(c)*"No two cases of contempt are wholly alike, and, in any event, apparent similarities are often superficial. Because the circumstances vary so infinitely,* ***it would not be proper to determine the length of sentence according to any fixed or unalterable standard****. Whilst having heeded that warning, because this case has excited so much interest both within Papua New Guinea and overseas and because it is unique to Papua New Guinea I have sought to ascertain what other cases (i.e. legal precedents) in other countries have decided about the question of length of sentence …* ***My conclusion is that there is no general consensus of judicial opinion*** *… in New Zealand in a fairly recent case involving a person who had scandalized a court a term of imprisonment of three months was imposed (see* ***Re Wiseman*** *[1969] NZLR 55)";*

(d) Hope J.A. in ***Attorney-General for New South Wales* v. *Mundey*** [1972] 2 NSWLR 887 at p. 916. said:

> *"The law of contempt does not punish people for ideas or views;* ***it is the communication of those ideas in circumstances which lead, or may lead, to an interference with the administration of justice that creates the offence****. A statement made to a dozen people would normally have little effect upon the administration of justice, although the effect may depend upon who those people are."*
>
> *In agreeing with that proposition, it must be said that* ***the dissemination of the statement said to be contemptuous is of decisive importance****."*

(e) In relation to the matter of punishment –

> *(i) "First, sentencing is a difficult task; it is often acknowledged to be a much more difficult task than ascertaining guilt";*
>
> *(ii) "Secondly, this case must surely be a landmark in the development of Papua New Guinea's constitutional and criminal law. It involves serious questions of civil liberty and of the protection of the community. In this case there are significant social, legal and political consequences for society as well as the offender. In view of these two observations it would be unsatisfactory for the sentencing decision to be made without a full statement about this Court's approach to its sentencing task";*

(f)*"All punishment for offences is fundamentally for the protection of the community, but a court in discharging its sentencing function should not impose a longer sentence than is otherwise fairly proportionate to the gravity of the offence assessed against its proper background"; "Sentences should be such as, having regard to all the proved circumstances, seem at the same time to accord with general community attitudes and to be likely to be a sufficient deterrent both to the offender and others.* ***The circumstances of the offence, i.e. the objective factors, are of paramount importance in determining the gravity of the crime. The circumstances of the offender, i.e. the subjective factors, are also vital****";*

(g) The following subjective factors are matters that must be taken into account –

(i) that the Respondent was of previous good character;

(ii) that the Respondent's antecedents were beyond reproach;

(iii) that the Respondent was a comparatively inexperienced person in the position;

(iv) that the Respondent as a senior Minister of the State has been convicted of contempt after a lengthy public and much publicised hearing is a substantial punishment in itself;

(v) that if the Respondent is imprisoned she may be expected to carry a special burden of punishment.

(h)*"The task of determining the sentence which 'accords with general community attitudes' involves making an intuitive assessment of what the community will support. At this time in Papua New Guinea in the present climate of opinion and when views are frequently polarised it is particularly difficult to determine what general community attitudes may be. Some assistance is to be found within the Constitution itself; further assistance is to be found in the statute law and the principles of the common law and equity which form part of the underlying law of Papua New Guinea. It is significant that the crime of attempting to pervert the course of justice (s. 139 of the Criminal Code [PNG]) is punishable by up to two years' imprisonment with hard labour. In this case I have tried to remain aware of prevailing community attitudes and I have tried to avoid going beyond those limits where*

punishment is seen as derisory at one extreme or unjust at the other; to exceed those limits at either extreme makes the punishment unacceptable";

(i) *"In trying to achieve a measure of public protection this case needs to be viewed not in isolation but in the context of an overall legal system which is developing along with the very nation itself";*

(j) *"There are offences where sentences of imprisonment must be imposed to mark the degree of disapproval by the law of the conduct in question and in the hope that other people will be deterred from like behaviour. This is such a case. In the instant case the imprisonment … will provide the best hope that further contempts of this type will not be committed in the future. Looking further ahead, as I believe the people of Papua New Guinea would want this Court to do and as the Papua New Guinean lawyers who will sooner or later be members of this Court would expect this Court to do, the* ***imprisonment … provides the best hope for the preservation of the independence of the judiciary and for the safeguarding of the rule of law under the Constitution****";*

(k) *"It is because the … contempt is likely to have had (and is likely, if it goes unpunished, to continue to have) such an adverse effect upon the administration of justice, that committal to prison is the only appropriate sanction. Assessing the Minister's conduct in the light of Papua New Guinea's development as a nation, taking account of the experience of other third world nations and paying particular attention to the need to safeguard the future of the rule of law in this country,* ***the conclusion is reached that the Minister should be imprisoned with light labour for eight months****."*

[My emphasis]

[47] As Wilson J noted in his judgment, he had attended some four years earlier, in August 1975, the fourth Commonwealth Magistrates' Conference held in Kuala Lumpur, Malaysia, where the theme of the conference was: "The Judiciary, the State and the Public in the Administration of Justice" with emphasis given to "The Independence of the Judiciary". As he noted,

> *"One of the papers presented at that conference was entitled 'Safeguards for Judicial Independence in Law and in Practice' … presented by Professor K. W. Patchett of the University of Wales and formerly Dean of Law at the University of the West Indies [which] …*

examined the circumstances in some of the developing nations of the Commonwealth and he tried to demonstrate the limits upon the use of legal safeguards for the protection of judicial independence. I have drawn extensively upon Professor Patchett's paper in preparing that part of this judgment which is headed 'The independence of the judiciary'".

[48] In addition, Wilson J annexed at the end of his judgment extracts from Professor Patchett's paper part of which I quote here as relevant today in the Fiji Islands in 2009 as it was (and perhaps still is) in Papua New Guinea in 1979 or in the Caribbean in 1975:

> *"The critical appraisal of organs of established order which seems to be a growing feature of democratic societies is not confined to the more developed of them. But in some developing countries, the public ambivalence towards the courts and the men who preside over them appears to be more pronounced and may be traceable to the experience of colonial times and the social organisation which the legal systems then endorsed ...*
>
> *Public confidence may also be undermined by misconceived or misreported criticism. The reputation for impartiality of the judiciary or of particular judges can be substantially, even irreparably, damaged by ill-considered attacks ... Invariably the judges will be unable to make a public defence of their positions and if there is no-one in an influential position to answer on their behalf, or at least to dissipate the effects of the attacks, the judiciary will be diminished ...*
>
> ***The fervent wish to make constructive improvements in the quality of the law may lead to outspoken public criticism of the judiciary. Unless this is put into the context of rational debate, it may serve merely to exacerbate the situation** ...*
>
> *It is axiomatic that, for a judge to practise his independence, he needs to know that any independent stand will be respected and will not be followed by vindictiveness or adverse repercussions against himself personally or on the judiciary as a whole …*
>
> *There are no simple safeguards, and especially no obvious new ones which could be embodied in the law, to make the vulnerable judge more certain and to permit him more than at present to discharge his [or her]functions without constantly looking over his shoulder. The judge ... has been cast by the Constitution in a pivotal role in holding one of the essential balances between competing power weights. The ability to hold that balance depends in part upon his [or her] own strength and in part upon the degree of stress which is placed upon the crucial element. **Too much stress, insufficient strength, and the system will break**."* [My emphasis]

[49] In coming to a decision on penalty, of the various judgments cited to me by Counsel or those which the Court has itself located, I have found the judgment referred to me by Counsel for the Respondent in ***DPP v Francis & Anor (No 2)*** (Unreported, Supreme Court of South Australia, 25 August 2006, Belby J; Austlii: [2006] SASC 261 – Reasons for Sentence, http://www.austlii.edu.au/au/cases/sa/SASC/2006/261.html), particularly helpful. As noted in the summary set out in the above table, this was a case of contempt (as well as another charge) made against a radio talkback host and his employer following scandalous comments made on air about a magistrate who was to consider bail once they had received a psychiatric report for an accused of a child pornography offence.

[50] As the case report notes, the employer "FCB Radio" submitted "in mitigation … that it had already paid out $110,000 in settlement of a claim for damages for defamation brought by the Magistrate", of which the employer "had to pay the sum of $50,000 by way of uninsured excess". As the Court noted:

> *"While that is an indication of FCB's acknowledgement of wrongdoing, the settlement relates only to the damage to the personal reputation of the Magistrate.* ***It does not redress the damage caused by unjustifiably exposing the Magistrate and the judicial system to public ridicule, odium and contempt****."* [My emphasis]

[51] In relation to the radio talkback host "Mr Francis", the Court noted:

(a) That he was born in 1939 (making him 67 years at the time of sentencing);

(b) That he had been involved in radio since 1952 (approximately 54 years at the time of sentencing);

(c) That he had been hosting his own evening talk back show since 1985 (approximately 21 years at the time of sentencing);

(d) That he had received a number of awards for his performance in radio and television including a Medal of the Order of Australia in 1998 "For service to the community, particularly through supporting charitable organisations which seek to help young people and to the media in the area of talk-back radio";

(e) In all his 48 years of broadcasting he has never been charged with contempt before;

(f) Although *"he has a high public profile … which he has used to benefit the community ... with such a profile comes an ability to influence a wide range of public opinion, and hence the need to do so responsibly.* ***The uninformed and damaging outburst*** *on 26 October 2005,* ***can only serve to emphasise the need for someone in his position to exercise that power responsibly****"*;

(g) Whilst *"he may have a reputation … for expressing 'robust views in strong and often exaggerated and florid terms'. He cannot be criticised for that.* ***But when he chooses to do so*** *and to encourage others to do so* ***without ascertaining the true facts and in a manner which denigrates and ridicules the system of justice*** *which guarantees that very freedom,* ***he must answer the consequences****"*. [My emphasis]

[52] In relation to the employer "FCB Radio", the Court noted:

(a) That it operated the radio station, was wholly owned by another company which in turn was "owned by a substantial media organisation in the UK" operating many radio stations in all mainland capital cities and some regional areas in Australia and that "in its history of broadcasting in Australia, it has never been found guilty of contempt";

(b) That *"before this incident it had conducted training for staff concerning the requirements of the Broadcasting Services Act 1992 (Cth), the Commercial Radio Codes of Practice and Standards under the Broadcasting Services Act and developed in accordance with the requirements of section 123 of the Act. It has provided other training concerning defamation, contempt and complaints generally"*;

(c) That *"since the offending broadcast, FCB has undertaken additional training directed towards Mr Francis in particular with emphasis on all aspects of contempt, together with appropriate documentary aids. FCB has included in its current contract with Mr Francis a provision allowing termination of the contract without notice in the event of Mr Francis committing a further contempt";*

(d) That *"notwithstanding these measures …. FCB had no mechanism in place to warn Mr Francis or take him off the air once the first contempt was committed right at the beginning of the programme. FCB seems to have been quite unaware of the contempt until alerted to it, almost a full day later, by the senior media liaison officer of the Courts Administration Authority. It was only then that the station, to use the words of its counsel, went into damage control."*

(e) That *"the other identifiable failure in the system was the provision to Mr Francis of a brief and inaccurate summary of the news item, the source of which was not explained, which formed the basis of Mr Francis' attacks. FCB must take its share of the blame for providing the source on which Mr Francis based his contemptuous outbursts."*

[53] In relation to the determination of appropriate penalties, the Court noted:

(a) That the State's *Criminal Law (Sentencing) Act 1988* (SA) had no application to punishment for contempt;

(b) That whilst *"the categories of contempt are numerous, and the result in one case will not necessarily be applicable to the result in another"* it found guidance from the judgment of Kirby P (at 741-742) in ***Director of Public Prosecutions v John Fairfax and Sons Ltd & Ors*** (1987) 8 NSWLR 732 which *"identified a number of principles relevant to cases like the present"* (even though being a contempt of court for publishing details concerning an accused pending trial) being –

(i) *"the intent and 'culpability' of the contemnor";*

(ii) *"the need, objectively, to ensure, whatever the intent, that such conduct is emphatically denounced and effectively deterred";*

(iii) It is not necessary in all cases *"that the court proceed to punish the contemnor"* and *"in some cases, the prosecution itself, the burdens of the trial, the published findings of the court and an order for costs will be adequate to vindicate the public interest, to punish the contemnor and to deter others*";

(iv) *"In cases of publication such as the present regard will be had to the "human element" which is inescapable in any system, however*

careful, for the prevention of contempt of court by the media. Regard will also be had to the good record of a publisher and to the system which it has put in place to ensure against interference in the administration of justice";

(v) *"Where there has been a recognition that an item has a potential to amount to contempt, and the publisher nonetheless proceeds to publish it .....; where there is found to be reckless indifference as the effect of the publication, though it is a contempt ..... or where there is irresponsible conduct amounting to gross negligence ....., the courts have not considered that a finding of guilt alone is sufficient to punish the contemnor"*;

(vi) *"**Where there is deliberate conduct**, including persistent conduct **without obtaining appropriate legal advice**, **though the contemnor is aware of what he was doing, an especially serious view will be taken of the contempt**";* [My emphasis]

(c) *"The relevant principles applicable to punishment for contempt where there are imputations against courts and judges … were summarised by the High Court in **Gallagher v Durack** (supra)"* where it was acknowledged that in such cases *"the law endeavours to reconcile two principles … that speech should be free, so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong-headed"* and as Dixon J said in ***R v Dunbabin; Ex parte Williams*** (supra) at 447 *"it is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method of repressing imputations upon Courts of justice which, if continued, are likely to impair their authority";*

(d) In determining whether the Court should impose some sanction the majority of the High Court of Australia noted in ***Gallagher v Durack*** (supra) that *"in many cases, the good sense of the community will be a sufficient safeguard against the scandalous disparagement of a court or judge"* and that "the summary remedy of fine or imprisonment" is only applied where

(citing Evatt J in ***R v Fletcher; Ex parte Kisch*** (1935)(supra) *"the Court is satisfied that it is necessary in the interests of the ordered and fearless administration of justice and where the attacks are unwarrantable";*

(e) As Belby J noted in ***Francis***, the reason that the majority of the High Court of Australia refused leave in ***Gallagher*** to appeal the sentence imposed by the Federal Court of Australia of three months' imprisonment was –

(i) *"the gravity of the contempt"*;

(ii) *"there was no apology"*;

(iii) *"a fine would not be paid by the person convicted out of his own funds, thus defeating any deterrent effect of a penalty by way of a fine"*;

(f) Although not strictly applicable to the offence of contempt by scandalising a court of judge, Belby J noted in ***Francis*** the situation "where there has been interference with the administration of justice in a particular case" such that "different considerations apply as to appropriate penalties" citing ***Director of Public Prosecutions v Wran*** (1987) 7 NSWLR 616 where following a judgment of the New South Wales Court of Appeal allowing an appeal and directing a re-trial for*"the Honourable Mr Justice Murphy, a Justice of the High Court … against a conviction for attempting to pervert the course of justice, and had directed a re-trial",* the then Premier of the State had said: *"I have a very deep conviction that Mr Justice Murphy is innocent of any wrongdoing"* which was then reported by the *Sydney Morning Herald* "under a banner headline": "MURPHY INNOCENT – WRAN". As Belby J noted in ***Francis***, the Court found the Premier *"was held to have acted recklessly and with indifference as to the effect the statements might have on the administration of justice in respect of the new trial"* imposing a penalty of $25,000 on the Premier and $200,000 on the newspaper;

(g) As for the penalties to be imposed in ***Francis***, Belby J found –

(i) That although previous cases provide *"some guidance, no two cases are the same, and the value of money has changed*";

(ii) That the penalties *"will reflect the seriousness of the offending"* as well as *"the other factors identified"* including what Counsel has put on

their behalf;

(iii) That the contempt *"involved a bitter and sustained attack on and repeated denigration of a judicial officer and of the judicial process"*;

(v) That the contempt *"was done intentionally, albeit with subsequent regret and apology"*;

(vi) That the Court *"cannot regard the apologies as spontaneous"*;

(vii) That in the case of the employer *"despite the taking of some precautions, there was a failure in the system of supplying the information for the programme and inadequate monitoring of the programme at the time"* such that it should be fined $60,000 *"but for the plea of guilty, its apology and its past record … that will be reduced to $45,000"*;

(viii) That as for the employee radio talk back host *"it warrants committal to prison"* for three months, however, with the plea of guilty *"that will be reduced to 9 weeks"*, given however, the offender's *"past record, his contrition and that this is his first offence, I will suspend the sentence on his entering into a bond in the sum of $2000 to be of good behaviour for a period of 18 months*".

[54] As to what penalties should be imposed in relation to the three Respondents in the present matter, these must ultimately reflect the findings of the Court.

D. POST DECEMBER 2006

1. The proceedings in *Qarase v Bainimarama*

[55] In December 2006, what was seen as the fourth coup d'état in just over 19 years took place in the Fiji Islands. The events surrounding that time were subsequently the subject of extensive litigation in the High Court (see ***Qarase v Bainimarama***, Unreported, High Court of Fiji, Civil Action Nos. HBC 60 of 2007 and HBC 398 of 2007, 9 October 2008, Gates ACJ, Byrne and Pathik JJ; Paclii: [2008] FJHC 241, http://www.paclii.org/fj/cases/FJHC/2008/241.html) wherein it was held (amongst other matters) as follows at paragraph 173:

> *" … (ii) The decision of the President to ratify the dismissal of the Prime Minister and his ministers, to appoint Dr Senilagakali as*

Caretaker Prime Minister to advise the dissolution of Parliament, and the dissolution of Parliament itself, are held to have been valid and lawful acts in exercise of the prerogative powers of the Head of State to act for the public good in a crisis.

(iii) For the same reasons the further decision of the President to rule directly pending the holding of fresh, fair and accurate elections is upheld as valid and lawful.

(iv) For the same reasons, the President's decision to make and promulgate legislation in the interest of peace, order and good government in the intervening period prior to a new Parliament is upheld as valid and lawful.

(v) The grant of immunity by Promulgation was similarly within the powers of the President in the emergency, and such grant is upheld as valid and lawful."

[56] The hearing of the above took place in the High Court at Suva from 5th-20th March 2008 which was *"covered by television for re-broadcast on a daily basis"*. The Court then adjourned with judgment to be on notice.

[57] In the six month period until judgment was delivered on 9 October 2008, understandably, speculation was rife in parts of the media as to what it meant. Unfortunately, some of that speculation, from my own informal observation, concentrated on what SHOULD be the outcome and thus clearly bordered on contempt. Sadly, often leading "the charge" were politicians and lawyers. After a review of the judgments in ***Parmanandam*** and ***Chaudhary***, however, one should not have been surprised that this was the case. In addition, some academics and other media commentators also weighed in pontificating on what they believed SHOULD be the result.

[58] One can only presume that many of those who offered such comments had not read the judgments in ***Parmanandam*** and ***Chaudhary*** (freely available on the internet through Paclii in their unedited form) but were also oblivious that putting pressure on parties (or courts) during litigation or whilst a judgment is pending can amount to contempt: see ***Francis*** (supra); and ***Attorney-General v Times Newspapers Ltd*** (1973) 3 All ER 54. The latter arose at the height of the thalidomide litigation (which involved claims of horrific birth defects

allegedly as a result of taking a pill to alleviate morning sickness during pregnancy). *The Times* newspaper published a series of articles before any final settlement of claims had taken place causing the House of Lords to grant an injunction and to find contempt.

[59] As the High Court of Hong Kong held in ***Secretary for Justice v The Sun Newspaper & Ors***, (Unreported, Miscellaneous Proceedings No.HCMP452/2006, 3 October 2006, McMahon J, http://legalref.judiciary.gov.hk/lrs/common/ju/ju_body.jsp?DIS=54575&AH=&QS=&FN=&currpage=) in relation to contempt committed in relation to a pending criminal trial:

> "*That interference need not be deliberate or intended. It is sufficient if at the time of publishing there was an intention to publish, and that there was a real risk of prejudice to the trial by doing so.* (See ***Attorney-General v. South China Morning Post Ltd and Another*** [1984] HKC 500, ***Secretary for Justice v. Oriental Press Group Ltd and Others*** [1998] 2 HKC 627 and ***Secretary for Justice v. Wong Yeung Ng*** [1999] 2 HKC 24.)"

[60] Surprisingly, some politicians, a few prominent members of the legal profession, various academic and other commentators, appeared either oblivious (or reckless) to this form of contempt whilst judgment in ***Qarase v Bainimarama*** (supra) was pending. Fortunately for many of those people (and the media outlets who reported their remarks), neither the Attorney-General nor the three justices involved took any action.

2. The period post the High Court judgment in *Qarase v Bainimarama*

[61] After the judgment in ***Qarase v Bainimarama*** was delivered on 9 October 2008, (again speaking only from my informal observations), some of the reactions published in parts of the media again clearly bordered on contempt. Again, neither the Attorney-General nor the three justices involved in the case took any action, each showing great restraint. The cases of ***Parmanandam*** and ***Chaudhary***, however, illustrate that contempt by way of scandalising the court and/or a judge, is not a new phenomenon in the Fiji Islands since independence in 1970. Indeed, the role of politicians and members of the legal profession, particularly, appear to have been at the forefront of such

contempts as well as constant attempts at undermining public confidence in the judiciary.

[62] The publication of the letter to the editor in *The Fiji Times* on 22 October 2008 *"from a person named as Vili Navukitu said to be of Queeensland, Australia"*, clearly went beyond all boundaries of fair criticism or as Salmon LJ said in ***Blackburn*** (supra) *"**within the limits of reasonable courtesy and good faith"***. Indeed, to paraphrase the Fiji Court of Appeal in ***Parmanandam***, the test is an objective one. That is, **what any fair minded and reasonable person would understand from the letter**, and I am satisfied that a construction so arrived at fully supports the finding that this went beyond fair criticism and amounted to a gross contempt. Further, to also paraphrase the Court of Appeal from ***Chaudhary*** this was not an honest and fair comment based on truth. Rather as the Court of Appeal noted in ***Chaudhary*** citing with approval ***Solicitor-General v Radio Avon Ltd*** *"the mischief aimed at being a real risk of undermining public confidence in the administration of justice"* and "*went far beyond the voicing of mere suspicions"* such that these *"considered and unsubstantiated allegations of corruption were serious enough to constitute a real risk to the authority and independence of the Courts"*.

[63] For completeness, (and to put the said contemptuous letter to the editor published in *The Fiji Times* on 22 October 2008 in context) I should also mention that the then Chief Justice, Justice Daniel V. Fatiaki, was suspended by the President of the Fiji Islands, His Excellency, *Ratu Josefa Iloilo,* at the beginning of 2007, pending a report by a tribunal to be established by and report to the President examining Justice Fatiaki's fitness to continue in office. There has been various litigation (one of which is still pending before me) in relation to that suspension and the subsequent appointment of Fatiaki J's acting replacement in January 2007 of Justice Anthony T.H.C. Gates. It was also announced in early December 2008 (post the hearing of the plea in mitigation proceedings before me) that Justice Fatiaki and the interim government had reached a settlement whereby the suspended Chief Justice resigned, all litigation was to be withdrawn, and, in return, he was to receive a lump sum payment. This was followed soon afterwards with the

announcement, just prior to Christmas 2008, that Justice Gates had been appointed by the President as Chief Justice of the Fiji Islands and, I understand, he was sworn in as such last Monday, 19 January 2009.

E. THE RULINGS OF THE COURT IN THE CURRENT CASE

1. First Ruling: Evidence as to other alleged "contempts" by the Respondents

[64] Returning to the current case, at the hearing of the pleas in mitigation, Counsel for the Applicant sought to rely upon an Affidavit of **SHARILA PRASAD LAZARUS**, to rebut the submission by Counsel for the Respondents that the publication of the said letter was an isolated incident and to show by way of annexures to the Affidavit as stated at paragraph 10, *"numerous articles … which … border on contempt"*.

[65] The Court agreed with the objection raised by Counsel for the Respondents as to the tender of the said Affidavit finding that such material was not relevant to the present committal proceedings, in that, it was for the Applicant to have taken separate proceedings alleging contempt for such matters rather than trying to introduce them into these proceedings.

[66] Thus the first ruling of the Court is that the Affidavit of SHARILA PRASAD LAZARUS be rejected as irrelevant to the present sentencing hearing. Similarly, the Court will attribute negligible weight to Annexure "NVR 2" annexed to the Affidavit of Mr RIKA. All the Court will be noting as relevant is that each of the Respondents have no prior records for such an offence.

2. Second Ruling: Alleged larger "conspiracy" involving *The Fiji Times*

[67] The Court notes that at the initial mention of this matter Counsel for the Applicants had attempted to mention that the publication of the said letter was part of a larger "conspiracy" on the part of those involved with the publication of *The Fiji Times*. Such a submission was swiftly rejected by the Court on that occasion noting that none of the Respondents had been charged as such and were before the Court purely in relation to committal proceedings for contempt through the publication of a letter to the editor which it was agreed had scandalised the Court and three of its judges.

[68] Counsel for the Applicant again attempted to allude to the "conspiracy" issue during his submissions as to why the Court should accept the tender of the Affidavit of SHARILA PRASAD LAZARUS.

[69] So as to be clear on the issue, if not already, the second ruling of the Court is that the submission that the publication of the said letter was part of a larger "conspiracy" on the part of those involved with the publication of *The Fiji Times*, be rejected as irrelevant to the present sentencing hearing for the reasons outlined, in particular, that no other committal proceedings for contempt and/or conspiracy charges have been laid against any of the Respondents.

3. Ruling on an alleged bias involving *The Fiji Times*

[70] During the Court's Ruling rejecting the tender of the said Affidavit of SHARILA PRASAD LAZARUS, I made comment that because a media company might decide to run a concerted campaign does not mean that it has breached the law as it presently stands.

[71] Thus the third ruling of the Court is that even if it were proven that *The Fiji Times* is biased, they still have a right to publish. Any decision to be so biased is up to them: people can laugh at them, ridicule them and question whether they want to be taken seriously as a media organisation, but, as a private company**, they are entitled to be so biased so long as they do so within the law.** I make that comment subject, of course, to any voluntary media council "code of conduct" and adjudications such as may bind *The Fiji Times* as was referred to in the evidence of Mr DARYL TARTE, Chairman of the Fiji Media Council.

[72] In relation to specific criticisms of the Judiciary, "***they can say that we are mistaken, and our decisions erroneous***" so long as those criticisms are,"***within the limits of reasonable courtesy and good faith"*** as understood by "***any fair minded and reasonable person"***: Denning MR and Salmon LJ in ***Blackburn*** (supra); and the Fiji Court of Appeal in ***Parmanandam*** (supra).

F. SUBMISSIONS ON THE APPROPRIATE PENALTIES TO BE IMPOSED

1. Opening general submissions of both Counsel

[73] In his general written submissions, Counsel for the Applicant was of the view:

(a) That the punishment imposed on each of the Respondents should reflect –

(i) *"the gravity and seriousness of their actions in undermining the impartiality and authority of the judiciary and the members of the judiciary";*

(ii) *"the legal position that such incidents will be treated most seriously by the Courts"*;

(b) That the punishment should also be substantial to act as deterrence against any repetition of such contemptuous acts;

(c) That the Respondents be jointly and severally ordered to pay costs on a full indemnity basis.

[74] In his general written submissions in response, Counsel for the Respondents replied:

(a) That the submissions of the Applicant on an appropriate penalty *"have not correctly represented the law" nor "if they are intended as an original work … supported by principle"*;

(b) That there is no leading case *"on all fours with this one"*;

(c) That this was *"publication of content created by a third party"* an error which has been explained;

(d) That *"it was a single isolated incident";*

(e) That *"there was an unconditional apology made as soon as practicable after the matter was brought to the newspaper's attention"*;

(f) That *"in considering the appropriate penalty… the Court should be guided by precedent"*;

(g) That *"the Attorney-General's office proffers a 'one size fits all' solution which it submits must be punitive, involving a level of imprisonment twice what the Fiji Court of Appeal considered appropriate in* ***Parmanandam's*** *case and a level of fine seen only in the* ***Oriental Press*** *case [HCMP 407/1998 (Judgment 23 June 1998) and; HCMP407A/1998 (Sentence 30 June 1998)]".*

2. Submissions in relation to NETANI VAKACEGU RIKA, Editor in Chief of Fiji Times Limited including the *Fiji Times*

[75] In summary, according to Counsel for Mr RIKA:

(a) *"An error occurred"*;

(b) *"A prominent apology"* was made on the front page of the *Fiji Times;*

(c) Any sanction *"should be one that punishes a person guilty of oversight … not a person who consciously pens whole articles with an intention to attack the judiciary"*;

(d) He might be *"let off with a warning"* and required to pay costs.

[76] By contrast, Counsel for the Applicant submitted specifically in relation to Mr RIKA "that a custodial sentence of at least 6 months be imposed on … the editor … of *The Fiji Times"*.

2. Submissions in relation to <u>REX FREDERICK GARDNER</u>, Chief Executive Officer of Fiji Times Limited and acting publisher of *The Fiji Times*

[77] In summary, according to Counsel for Mr GARDNER:

(a) Mr GARDNER *"is not involved in the day to day operations of the company"* and *"had no direct responsibility"* for what occurred;

(b) Mr GARDNER accepts, however, *"that he does not wish to shirk any responsibility as its seniormost [sic] manager"*;

(c) *"While the Court may consider it appropriate to impose a 'general deterrent' sentence of 'some kind' to 'make an example' of the individual, it should not be a sanction which is sufficiently material to impact on Mr Gardner's application to gain a work permit"* as this will affect not only Mr GARDNER but also the company;

(d) Mr GARDNER might be *"let off with a warning"* and required to pay costs.

[78] Again, by contrast, Counsel for the Applicant submitted specifically in relation to Mr GARDNER *"that a custodial sentence of at least 6 months be imposed on … the publisher of The Fiji Times"*.

3. Submissions in relation to the Fiji Times Limited as publisher of *The Fiji Times*

[79] In summary, according to Counsel for the Fiji Times Limited:

(a) The company has been "*a good corporate citizen and a law-abiding company"*;

(b) Its systems including a news manual, access for senior editorial staff to the company's lawyers as well as pursing an initiative with the Judiciary to improve communication and understanding;

(c) This was *"an isolated error in publishing content created outside the organisation"*;

(d) There has been a complete apology;

(e)The failure in the system has been addressed with the hiring of a new associate editor;

(f) There are no authorities (of any weight) to suggest there should be a sanction against a proprietor in such circumstances.

[80] Once again, by contrast, Counsel for the Applicant submitted specifically in relation to the Fiji Times Limited that the Court "imposes a substantial fine … in the sum of F$1million".

F. THE FINDINGS OF THE COURT IN RELATION TO THE CONTEMPT AND CULPABILITY

1. Finding in relation to the letter from "Vili Navukitu" of "Queensland, Australia" published in *The Fiji Times* on 22 October 2008

[81] It is the Court's understanding that the following facts are not in dispute in relation to the said contemptuous letter:

(a) That a letter from a person allegedly calling themselves "*Vili Navukitu"* of *"Australia"* was originally published in the *Fiji Daily Post* on 17 October 2008;

(b) That virtually the same letter (though a slightly edited version) from a person allegedly calling themselves *"Vili Navukitu"* of *"Queensland, Australia"* was published in *The Fiji Times* on 22 October 2008.

[82] It is finding of this Court that both forms of the letter are contemptuous in scandalising the High Court of Fiji and, in particular three of its most senior judges. Indeed, those responsible for publishing the said letters in both newspapers have pleaded guilty that they are in contempt.

2. Findings in relation to the appropriateness of commencing committal proceedings

[83] A suggestion was made in the written and oral submissions of Counsel for the Respondents (as well as alluded to the affidavit material filed) that "this is not really a case that it was necessary to bring in the way it has been brought", that is, by way of committal proceedings. Instead, it was suggested that a request should have been made of *The Fiji Times* for a suitable withdrawal and apology (of which there would have been respectful compliance) such that "these proceedings would perhaps not have been necessary".

[84] It is the finding of this Court that the publication of the said letter was a contempt in the clearest sense of "scandalising a Court or a judge", indeed, in this case the "scandalising" was both of the High Court of Fiji and three of its most senior judges. To suggest that it was a minor matter suitable for the Attorney-General to seek a "slap on the wrist" of *The Fiji Times* by way of having them publish a retraction and an apology rather than instituting committal proceedings misunderstands the seriousness of the matter. As I mentioned at the hearing of the plea in mitigation, one could only imagine the condemnation from *The Fiji Times* if this was the way in which the Office of the Director of Public Prosecutions and/or the Police dealt with a vicious assault. **And let there be no mistake, this was a vicious and cowardly attack upon the integrity of the judiciary and, in particular, three of its longest serving judges**. I say cowardly as I note that no person has as yet been prepared to come forward and say that they wrote the letter under a nom de plume or that they are "*Vili Navukitu"* of Australia (and the case has received publicity in Australia, a fact to which I will return at the end of my judgment).

[85] Further, as discussed by the Fiji Court of Appeal ***In re Charles Gordon*** (Civil Appeal No.49 of 1975, 16 March 1976, Gould VP, Marsack and Henry JJA; Paclii: [1976] FJCA 4, http://www.paclii.org/fj/cases/FJCA/1976/4.html) the question of whether or not to issue such proceedings is a proper role for the Attorney-General. In ***Gordon***, a Summons was issued by the Supreme

Court (as the High Court was then known) *"under the hand of Williams J and directed to the appellant to appear before the Supreme Court … to show cause why he should not be committed for contempt of court"* for an alleged deception of the Senior Magistrate at Lautoka.

[86] Although the Court of Appeal was *"satisfied on the authorities … that Williams J was entitled to act, as he did, ex mero mutu"*, they also noted from the authorities *"that a preference is expressed for motions for committal for contempt being brought by the Attorney General"*, a point made by Lord Diplock in ***Attorney-General v Times Newspapers Ltd*** (supra) at page 75 and Lord Cross of Chelsea at page 87.

[87] Thus the Court of Appeal in ***Gordon*** although dismissing the appeal and confirming the fine imposed by Williams J made the following observation:

> *"We feel we should not part with the case without expressing some surprise that this rather exceptional procedure should have been preferred. The learned judge said the Law Society had been fully informed, but it can only be a matter of speculation whether that means that the Court had referred the matter to the Council, as it had power to do, under section 60 of the Legal Practitioners Ordinance (Cap. 228). The learned judge also indicated that he was hesitant to overburden, the few experienced members of the Legal Department (presumably by referring the matter to the Attorney-General to consider action under Order 52 of the Rules of the Supreme Court).* ***We consider it desirable to observe generally that where the alleged contempt is not in the face of the Court, the procedure under Order 52 should be regarded as normal and desirable, unless there are cogent reasons for preferring another course****."* [My emphasis]

[88] In the present case, the then Acting Chief Justice and/or the other two judges involved could have issued contempt proceedings on their own behalf. The matter was, however, (and rightly in my view) taken up by the Attorney-General. Therefore, it is the finding of this Court that the matter was one appropriate for the commencing by way of committal proceedings issued by the Attorney-General. Indeed, as Issacs J said in the High Court of Australia in ***Porter v R; Ex parte Chin Man Yee*** (1926) 37 CLR 432 in reply to a submission by Counsel for the Crown (Owen Dixon KC as he then was) as to whether any punishment should be imposed in relation to a contempt:

> *"I do not overlook the fact that on behalf of his clients, the relators, Mr.* Dixon *told this Court that he did not think the articles were of the character meriting punishment for contempt. It was a most candid observation to make, and the candour of learned counsel deserves recognition.* ***But contempt of Court has two aspects****—the private and the public aspect.* ***From the private aspect, a party may yield his claim to protection. But from the public standpoint, the Supreme Court of the Territory has its duty to perform*** **sua sponte** ***in maintaining inviolable the pure and uninfluenced administration of justice****. No private interests and no private yielding or admissions can affect that aspect. It is a duty to the Crown and the public.* *And, regarding the matter from that standpoint, the concession made on behalf of the respondents is, in my view, irrelevant."* [My emphasis]

(See also the view of Evatt J also from the High Court of Australia in ***R v Fletcher; Ex parte Kisch*** (1935) (supra) cited earlier in this judgment.)

[89] The suggestion *"that journalists may have been led to believe that they would not be prosecuted for the offence of scandalising the court because abusive attacks on judges have escaped prosecution elsewhere, and because the offence has been thought at various times to be obsolete"* was also raised during the sentencing hearing of the ***Oriental Press Group Limited & Ors*** (see HCMP407A of 1998 – ***Secretary for Justice v Oriental Press Group Limited & Ors*** – sentencing , 30 June 1998, Chan CJHC and Keith J) (http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=17480&QS=%28%7BHCMP407%2F1998%7D%7C%7BHCMP000407%2F1998%7D+%25caseno%29&TP=JU) where the High Court of Hong Kong, Court of First Instance noted at paragraph 7: *"…we do not regard it as being a serious mitigating factor. As we said in our judgment,* ***the rarity of prosecution is*** *not*

> *"because of a belief that there is no room for this branch of the law of contempt in a society which places so high a premium on an independent and vigorous press and freedom of expression, but rather* ***because attacks on the judiciary are so infrequent*** *and prosecutions for contempts of this kind are only initiated in the most outrageous cases."* [My emphasis]

[90] In addition, to complain of selective law enforcement is not a matter for the courts: ***Wright v McQualter*** [1970] 7 FLR 305; ***State v Kunatuba*** (Unreported, High Court of Fiji, 14 November 2006).

3. Findings in relation to the culpability of <u>NETANI VAKACEGU RIKA</u>, Editor in Chief of Fiji Times Limited including the *Fiji Times*

[91] It is the Court's understanding that the following facts are not in dispute in relation to Mr RIKA and the publication of the said contemptuous letter:

(a) That Mr RIKA has stated in his said Affidavit (and confirmed in oral evidence) –

(i) That the letters to the editor page in *The Fiji Times* was his responsibility;

(ii) That "*Mr Navukitu's letter was received by email on 21 October 2008"*; and

(ii) That *"I processed it"*;

(b) That after Mr RIKA selected and edited the offending letter, he had it checked by his sub editors and he then arranged for it to be published the following day even thought it did not comply with his own company's editorial policy as follows:

(i) That the offending letter did not include the sender's home address *for verification;*

(ii) That the offending letter did not include the sender's day phone number *for verification;*

(iii) That the offending letter did not include the sender's evening phone number *for verification;*

(iv) That no check was made as to whether "Vili Navukitu" of "Queensland, Australia" even existed or was simply a *nom de plume;*

(v) That "*Letters published or submitted elsewhere will not be given priority*".

(c) That Mr RIKA has confirmed at paragraph 10 of his said Affidavit the process through which all letters are screened as follows –

> *"Letters are received in hard copy (post and facsimile) and email form. They are all required to be reviewed. Our policy requires letters to be short, to be signed by an identifiable person (and not under an assumed name except for very good reason). Letters containing defamatory material, which breach*

the Media Council Code of Ethics, which are obscene or promote racial hatred or which are otherwise in poor taste, will not be published. The same applies to letters which are in contempt of court or breach other laws. Many of these criteria require the application of personal judgment [sic] by experienced editors. Typically we would reject up to 10 letters a day as not being fit for publication. We must also, in a similar way, monitor email feedback on our stories as it comes through on our website and delete any material which offends our policy on electronic content."

(d) That in relation to the said contemptuous letter, Mr RIKA's supplemented oral evidence under cross-examination was as follows:

"Mr Pryde: *On paragraph 10 of the affidavit you go further when you talk about Letters to the Editor, requiring them to be reviewed and you talked about the Letters to the Editor policy. What is the Letters to the Editor policy with The Fiji Times?*

Mr Rika: *Letters should be 200 words or less in length, that they should be of good taste, they should not breach any laws of this country.*

Mr Pryde: *But Letters policy is a bit more than that is it?*

Mr Rika: *That's correct. We should have the full name, address, telephone contact details of the writer.*

Mr Pryde: *What's the reason for that Mr Rika?*

Mr Rika: *That is so we can verify that the person really exists and that in a case like … we would be able to find the letter writer.*

Mr Pryde: *Right, thank you. So did you verify the identity of the writer in this case?*

Mr Rika: *Identity was not verified in this case Sir.*

Mr Pryde: *Did you get an address from the letter writer?*

Mr Rika: *Only the email address*

Mr Pryde: *Is that sufficient for your purposes?*

Mr Rika: *That's insufficient Sir*

Mr Pryde: *So your policy in this case was ignored?*

Mr Rika: *It was breached*

Mr Pryde: *So the letters policy was breached Mr Rika?*

Mr Rika; *Yes*

Mr Pryde: *When was Sophie Foster employed?*
Mr Rika: *After I rejoined the company, I think October this year*

Mr Pryde: *So she is now in the Letters policy department is she?*
Mr Rika: *We have a number of people who now review this process, Ms Foster is one of them*

Mr Pryde: *So now on paragraph 12, you state that you received allegedly Mr Navukitu's letter, the subject of the current proceedings, that's correct isn't it?*
Mr Rika: *Yes*

Mr Pryde: *And you say you processed it?*
Mr Rika: *Yes*

Mr Pryde: *And you also said you recall the word "biased and corrupt" don't you?*
Mr Rika: *Yes*

Mr Pryde: *So you will be aware of the decision in the Qarase case?*
Mr Rika: *Yes*
…
Mr Pryde: *You would also be aware would you not that the letter was in relation to the Qarase Case?*
Mr Rika: *Yes*

Mr Pryde: ***So you read the letter, you processed the letter, you read the word biased and you read the word corrupt, that didn't sound any warning bells to you?***
Mr Rika: ***No***

Mr Pryde: ***You are aware of what it means to be in contempt of Court, are you?***
Mr Rika: ***I am***

Mr Pryde: ***And you also aware that the other cost of letters which might run the risk of undermining public confidence in the administration of Justice are a contempt of the Court, you are aware of that Mr Rika?***
Mr Rika: ***Yes***

Mr Pryde: *Have you heard the Attorney General talk to the Media about contempt?*
Mr Rika: *Yes*

…

Mr Pryde: *You attended the lecture on contempt by members of the judiciary, is that right?*

Mr Rika: *Yes Sir*

Mr Pryde: *And who else was at the Lecture?*

Mr Rika: *Most of our reporters, publishers, Justices Shameem and Hickie, Sir*

…

Mr Pryde: *Right ok, so this was put on for the benefit of The Fiji Times?*

Mr Rika: *Yes Sir*

Mr Pryde: *And what was the purpose of the talk by members of the Judiciary?*

Mr Rika: *Purpose of the talk was for the Judiciary to raise with us matters which they believe were of concern to the Judiciary and which The Fiji Times had interests.*

Mr Pryde: *Right so did the issue of contempt come up at that talk?*

Mr Rika: *It did Sir*

Mr Pryde; ***So you processed the letter, I just take you back once again, just to confirm you didn't think the words biased or corrupt in the letter were enough to send this letter to your legal advisers?***

Mr Rika: ***I read the words, after reading the word "judgment" Sir, I was thinking about the Judgment not the Judges.***

Mr Pryde: *Then the letter was sent to your sub-editors is that correct?*

Mr Rika: *That's correct*

Mr Pryde: *Then your subeditors would have looked at it again is that right?*

Mr Rika; *Yes Sir*

Mr Pryde: *And they edited it, didn't they?*

Mr Rika: *I believe so Sir.*

Mr Pryde: *And then it was finally published wasn't it?*

Mr Rika: *Yes"*

There was no re-examination.

(e) That Mr RIKA is a journalist of some 20 years standing, 15 years of which has been spent at *The Fiji Times* and is aware of a news organization responsibilities and, in particular, those of an editor *"to ensure that respect for the court's of the country is not undermined"*;

(f) That Mr RIKA has been involved in a number of initiatives to improve the knowledge of the editorial staff in the various publications of Fiji Times Ltd in court reporting and, in particular, ensuring that the organization's "publications do not offend in the area of contempt" with such initiatives including –

(i) Initiatives with the Media Council of Fiji;

(ii) Initiatives with a former Justice of the Fiji Court of Appeal and Justice Shameem of the High Court;

(iii) Holding of a training seminar conducted by Justice Shameem and me in September 2008 *"where issues of contempt of court and scandalising the courts were discussed"*;

(g) That *The Fiji Times* has the following procedures in place to assist staff in dealing with potentially contemptuous matters –

(i) That there is a news manual where contempt of court issues are raised and discussed;

(ii) That there is a defined process whereby matters are referred to the newspaper's lawyers to *"review any potentially controversial or opinion pieces on the courts (as well as other matter [sic] which is potentially defamatory or may breach other laws)"*;

(iii) That *"all senior editorial staff have direct access to the company's lawyers to legally review material and use this access liberally"*;

(iv) That *"it is not uncommon for a dozen stories or articles to be 'legalled' every week"*.

[92] Having considered the above as well as both the Affidavit and oral evidence of Mr RIKA, the Court makes the following three findings in relation to the culpability of Mr RIKA:

(a) First, that the publication of the letter was considered by Mr RIKA and went through a vetting process;

(b) Second, that any suggestion that the contents of the said letter were only glanced at by Mr RIKA, such that the said letter was published in haste, must be rejected;

(c) Third, that the decision by Mr RIKA to publish the said letter was done intentionally;

(d) Fourth, that the intention by Mr RIKA to publish the letter was either done with recognition that it had the potential to amount to contempt by way of scandalising the Court and three of its judges but nonetheless Mr RIKA proceeded to publish it or Mr RIKA was either recklessly indifferent or grossly negligent to that effect;

(e) Fifth, that the contempt committed was in the clearest sense of "scandalising a Court or a judge", indeed, in this case the "scandalising" was both of the High Court of Fiji and three of its most senior judges by name.

4. Findings in relation to the culpability of <u>REX FREDERICK GARDNER</u>, Chief Executive Officer of Fiji Times Limited and acting publisher of *The Fiji Times*

[93] It is the Court's understanding that the following facts are not in dispute in relation to Mr GARDNER and the publication of the said contemptuous letter (noting that his Affidavit was not challenged by Counsel for the Applicant):

(a) That Mr GARDNER has had 40 years' experience in the newspaper industry ;

(b) That Mr GARDNER is currently the acting Chief executive Officer of Fiji Times Limited and acting publisher of *The Fiji Times* although the day to day responsibility for the editorial section of the newspaper is independent as he has explained at paragraphs 8-9 of his Affidavit –

> *"There is a long-established policy in The Fiji Times – similar to all News Limited media companies – that the editorial section of the newspaper is independent of and not influenced by the management or commercial sections of the company (other than is necessary for the editorial section to function effectively as part of the organization). This policy is adhered to in most credible news organizations to avoid, for example, advertisers being able to influence the editorial content of the newspaper.*

As a result of this policy, I was not personally involved in any of the actions or omissions resulting in the publication of the offending letter to the editor. However I do not wish to shirk any responsibility to be attributed to management of Fiji Times Limited as a result of this error."

[94] The Court notes that the Affidavit of Mr GARDNER was not challenged by Counsel for the Applicant through cross-examination. As such, the Court accepts the veracity of the matters to which Mr GARDNER has deposed as to his culpability. In this regard, the Court notes the judgment of Mason NPJ in ***HKSAR v Lee Ming Tee*** (Unreported Hong Kong Court of Final Appeal; HKlii: [2003] HKCFA 54 http://www.hklii.org/hk/eng_jud/HKCFA/2003/20030822_FACC000001_2003.html) at paragraphs 70-71:

*"70. It is convenient to begin with the challenge to the Judge's findings of fact in the Kin Don matter. The Judge did not indicate the standard of proof he was applying or the degree of satisfaction which was required. It is not in dispute that the civil standard was applicable and that the civil standard of proof on the balance of probabilities calls for a degree of satisfaction which varies according to the gravity of the fact to be established. The principle is that in a civil case, even a civil case involving allegations of the commission of a criminal offence, the tribunal of fact must be reasonably satisfied of the fact sought to be established, having regard to the gravity of what is sought to be established, though not with the degree of certainty which is indispensable in criminal proceedings (**Briginshaw v. Briginshaw** (1938) 60 CLR 336 at 360-368, per Dixon J; **Helton v. Allen** (1940) 63 CLR 691 at 712-713, per Dixon, Evatt and McTiernan JJ; **Rejfek v. McElroy** (1965) 112 CLR 517 at 520-522).*

*71. Statements may be found in Privy Council and English decisions which equate the burden of proof in civil cases of acts which are tantamount to a criminal offence to the criminal standard of proof. (See, for example, **Lanford v. GMC** [1990] 1 AC 13 at 19-20, per Lord Lowry; **In re A Solicitor** [1992] 2 WLR 552 at 562, per Lord Lane CJ.) It is now accepted, however, that the correct approach was that stated by Morris LJ in **Hornal v. Neuberger Products Ltd** [1957] 1 QB 247 at 266. This approach was approved in **In re H (Minors)** [1996] AC 563 where Lord Nicholls of Birkenhead (with whom Lord Goff of Chieveley and Lord Mustill concurred) said (at 586E)*

*"When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that **the more serious the allegation the less likely it is***

> ***that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.***" [My emphasis]
>
> *Lord Nicholls's remarks accord with the law as it has been stated and applied in Hong Kong (see* ***Attorney-General v. Tsui Kwok-leung*** *[1991] 1 HKLR 40).*"

[95] Therefore, having considered the Affidavit of Mr GARDNER, together with the Affidavit and oral evidence of Mr RIKA, the Court makes the following findings in relation to Mr GARDNER:

(a) First, that Mr GARDNER was not personally involved in any of the actions or omissions resulting in the publication of the offending letter to the editor which raises some issues as to the Court accepting his plea of guilt;

(b) Second, that although Mr GARDNER was not personally involved in any of the actions or omissions resulting in the offence, the Court is prepared to accept his plea on the basis that he has done so -

(i) after having received legal advice; and

(ii) on the basis that "*I do not wish to shirk any responsibility to be attributed to management of Fiji Times Limited as a result of this error",* that is, with a full consciousness of guilt.

5. Findings in relation to the culpability of the Fiji Times Limited as publisher of *The Fiji Times*

[96] It is the Court's understanding that it is not in dispute in relation to the Fiji Times Limited as publisher of *The Fiji Times* that there were procedures in place to assist staff in dealing with potentially contemptuous matters.

[97] It is the Court's finding that the system in place, however, was that it was left to the responsibility of the Editor in Chief as to whether he availed himself of such assistance, and which on this occasion he did not citing oversight and pressure of work; whereas the Court's finding was that the publication of the said letter was considered by the Editor in Chief having been through a detailed vetting process such that any suggestion that the contents of the said

letter were only glanced at by the Editor in Chief, resulting in the said letter being published in haste, must be rejected.

[98] In view of the above, it is the Court's further finding that the Fiji Times Limited as publisher of *The Fiji Times* must accept ultimate responsibility for the actions of its staff. Indeed, there has been no evidence led that the Editor in Chief acted outside of or not in accordance with his responsibilities such that the company has sanctioned him personally. Rather the "remedy" has been:

(a) that it has published an apology; and

(b) that the timing of the contempt coincided with the recruitment of an Associate Editor to relieve the workload of the Editor-in-Chief.

G. THE FINDINGS OF THE COURT IN RELATION TO MITIGATION

1. Findings in relation to the mitigation of NETANI VAKACEGU RIKA, Editor in Chief of Fiji Times Limited including the *Fiji Times*

[99] It is the Court's understanding that the following mitigating factors are not in dispute in relation to Mr RIKA and the publication of the said contemptuous letter:

(a) That Mr RIKA is a journalist of some 20 years standing and has no prior record or having ever been the subject of committal proceedings;

(b) That Mr RIKA has no prior criminal convictions;

(c) That Mr RIKA pleaded guilty at the first available opportunity;

(d) That an apology was published soon after the matter was brought to the attention of the Fiji Times Limited.

[100] Balanced against the above, the Court notes:

(a) That it was Mr RIKA who has conceded culpability in the matter;

(b) That the Court has found that the contempt was done intentionally;

(c) That the Court has also found that the intention by Mr RIKA to publish the letter was either done with recognition that it had the potential to amount to contempt by way of scandalising the Court and three of its judges but nonetheless Mr RIKA proceeded to publish it or that Mr RIKA was either recklessly indifferent or grossly negligent to that effect;

(d) That there was a subsequent published apology in *The Fiji Times*, though not from Mr RIKA personally nor was it spontaneous but published on 5 November 2008, some two weeks after the contempt had occurred (though it must be noted that this was after involvement with the company's lawyers and drafts exchanged with the Attorney-General's Office);

(e) That apart from the published apology in *The Fiji Times*, no personal apology was made by Mr RIKA to the High Court and/or to all or any of the three judges personally named in the said contemptuous letter by way of a detailed offering of his own volition in his Affidavit and/or during his evidence other than at paragraph 16 of his Affidavit where he stated:

> *"I can only repeat here this apology for what occurred. An oversight occurred.* ***There was no intention on our part*** *by the publication of this letter to undermine or cast doubt on the integrity of the Fiji judiciary";* [My emphasis]

(f) That there was no evidence of a personal apology made by Mr RIKA to the High Court and/or to all or any of the three judges personally named in the said contemptuous letter either-

(i) tendered to the Court in written form during the plea in mitigation made on his behalf by his Counsel on 4 December 2008; or

(iii) given through his Counsel in written form to Counsel for the Applicant to be passed on to the Court and/or the three named judges respectively;

(g) That no evidence was given by Mr RIKA as to his means to pay any fine and/or compensation.

2. Findings in relation to the mitigation of REX FREDERICK GARDNER, Chief Executive Officer of Fiji Times Limited and acting publisher of *The Fiji Times*

[101] It is the Court's understanding that the following mitigating factors are not in dispute in relation to Mr GARDNER and the publication of the said contemptuous letter:

(a) That Mr GARDNER has had 40 years' experience in the newspaper industry and has never been previously the subject of committal proceedings for contempt;

(b) That Mr GARDNER has never been convicted previously of any offence in any country;

(c) That although Mr GARDNER was not personally involved in any of the actions or omissions resulting in the publication of the said contemptuous letter, the Court has accepted his plea of guilt on the basis for the reasons outlined above;

(d) That Mr GARDNER pleaded guilty at the first available opportunity;

(e) That an apology was published soon after the matter was brought to the attention of the Fiji Times Limited.

[102] Balanced against that the Court notes:

(a) That apart from the published apology, no personal apology was made by Mr GARDNER to the Court or all or any of the three judges personally named in the said contemptuous letter by way of –

(i) offered of his own volition in his Affidavit; or

(ii) tendered to the Court in written form during the plea in mitigation made on his behalf by his Counsel; or

(iii) given through his Counsel in written form to Counsel for the Applicant to be passed on to the Court and/or the three named judges respectively;

(b) That no evidence was given by Mr GARDNER as to his means to pay any fine and/or compensation.

3. Findings in relation to mitigation by the Fiji Times Limited as publisher of *The Fiji Times*

[103] It is the Court's understanding that the following facts are not in dispute in relation to *The Fiji Times* and Fiji Times Limited:

(a) That all involved in this matter (appearing either as Counsel or by way of affidavits filed) are unaware of any previous contempt of court proceedings against the newspaper;

(b) That committal proceedings were issued against the newspaper's editor personally in 1991 (for *The Fiji Times'* reporting of a voir dire, that is, a trial within a trial, in the absence of the assessors, which caused such trial to be aborted);

(c) That certain journalists of the newspaper together with a State prosecutor, were made the subject of contempt proceedings in 1996 by a magistrate which was subsequently overturned on appeal to the High Court in 1997);

(d) That according to the company's lawyers the Fiji Times Limited has not been convicted of any criminal offence or breach of any other law in corporate memory;

(e) That the company had a news manual where contempt of court issues were raised and discussed as well as access for all senior editorial staff to the company's lawyers to legally review material and use this access liberally. In addition, there had been some informal training seminars involving judges from the Court speaking to staff;

(f) That an apology was published soon after the matter was brought to the attention of the Fiji Times Limited;

(f) That the company instructed its lawyers to plead guilty on its behalf at the first available opportunity.

[104] Balanced against that the Court finds:

(a) That the system in place had failed, principally because it depended upon one individual, Mr RIKA, as the Editor in Chief, to make the decision to publish without it being first being "legalled" or discussed with other senior colleagues. There was no evidence of any formal mechanism in place whereby the paper was routinely "checked over" either in-house or by the company's lawyers. The system seems to have been that Mr RIKA "was left to his own devices" so to speak without any editorial discussion involving other colleagues, or any peer "supervision" such as liaising with the company's lawyers and/or other senior managers of Fiji Times Limited;

(b) That there also seemed to be no system in place to check what had been published the previous day. Indeed, by its own evidence the company admits as much (through the Affidavit of its own Acting Chief Executive Officer and acting publisher of *The Fiji Times,* Mr GARDNER, at paragraph 10) when he stated: *"the issue first came to my attention when legal proceedings were served on The Fiji Times"*. This was also inferred by their current Chairman, Mr McDONALD, at paragraph 9 of his Affidavit);

(c) That there was no documentary supporting evidence such as staff memos, position descriptions or the like, that in the period between 22 October 2008 when the said scandalous letter was published and when the plea in mitigation was heard on 4 December 2008 that the system had been changed other than

the oral evidence of Mr RIKA that an Associate Editor, Ms SOPHIE FOSTER had been appointed and "*we have a number of people who now review this process"* and "*Ms Foster is one of them"*;

(d) That there was no evidence that in the period between 22 October 2008 when the said scandalous letter was published and the plea in mitigation was heard on 4 December 2008 that the Fiji Times Limited had undertaken any additional training for their editorial staff and, in particular, MR RIKA (and now Ms FOSTER), involving the company's lawyers concentrating on all aspects of contempt and/or reviewing their referral procedures by the editorial staff to the company's lawyers;

(e) That there was no evidence that in the period between 22 October 2008 when the said scandalous letter was published and the plea in mitigation was heard on 4 December 2008, that the Fiji Times Limited had amended its contract of employment with Mr RIKA to include (as occurred in ***Francis****)* a provision allowing termination of the contract without notice in the event of Mr RIKA committing a further contempt;

(f) That the other identifiable failure in the system operating at *The Fiji Times* was how a letter came to be provided to Mr RIKA even thought it did not comply with any of his company's published editorial policies concerning such letters to the editor. That is:

(i) it did not include the sender's home address *for verification;*

(ii)it did not include the sender's day phone number *for verification;*

(iii) it did not include the sender's evening phone number *for verification;*

(v) no check was made as to whether "Vili Navukitu" of "Queensland, Australia" even existed or was simply a *nom de plume;*

(vi) no check was made that the letter had been previously by the *Daily Post*, which normally would mean that having been *published or submitted elsewhere" it woulf not be given priority.*

(g) Of further concern, as would appear from the evidence, was that all the newspaper had as to the existence of the alleged author was an email address and that no member of staff at *The Fiji Times* even contacted the alleged person *for verification* as to identity prior to publication.

(h) That there was no evidence that in the period between 22 October 2008 when the said scandalous letter was published and the plea in mitigation was

heard on 4 December 2008, that the Fiji Times Limited and/or *The Fiji Times* had amended its procedures *for verification* of letters to the editor of *The Fiji Times*;

(i) That apart from the published apology, no personal apology was made by Mr McDONALD as the Chairman of the Fiji Times Limited on behalf of the company to the Court and/or all or any of the three judges personally named in the said contemptuous letter by way of –

(i) offered of his own volition in his Affidavit; or

(ii) tendered to the Court in written form during the plea in mitigation made on behalf of the Company by its Counsel; or

(iii) given through Counsel on behalf of the Company in written form to Counsel for the Applicant to be passed on to the Court and/or the three named judges respectively;

(j) That no evidence was given by Mr McDONALD or any other witness or tendered by Counsel on behalf of the company as to its means to pay any fine and/or compensation other than the said company is owned by the News Limited group, a large international news media organisation.

I. THE PENALIES TO BE IMPOSED

1. The penalty options

[105] In relation to the determination of appropriate penalties for each of the three Respondents, the Court has noted above the view of Belby J in ***Francis*** that the *Criminal Law (Sentencing) Act 1988* applicable in that jurisdiction had no application to punishment for contempt. It has also noted the view of a number of judgments also cited which were of the view that in terms of punishment, the Courts were looking at either committal (to prison), a fine and/or the payment costs.

[106] Even though the Court agrees that the *Penal Code* [Cap 17] of the Fiji Islands is not directly applicable to the present case, there are a number of options set out in the Code which the Court considers useful as a guide when deciding upon what penalty is appropriate to apply to each of the three Respondents in this matter. Such options being:

(a) Imprisonment (Section 28 of the *Penal Code*);

(b) Suspended sentence of imprisonment (Sections 29 and 30 of the *Penal Code*);

(c) Fine (Section 35 of the *Penal Code*);

(d) Security for keeping the peace (Section 41 of the *Penal Code*);

(e) Absolute and conditional discharge (Section 44 of the *Penal Code*).

[107] In addition, there is the question as to whether any order should be made as to compensation pursuant to sections 160 and 161 of the *Criminal Procedure Code*.

[108] I am also mindful that imprisonment should be of last resort, a view that has been espoused in many common law jurisdictions, even though the reality seems to be an ever growing prison population in many of them. For example, in New South Wales in Australia, Section 5 of that State's *Crimes (Sentencing Procedure) Act* 1999 mandates: *"(1) A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate."* Recently, however, it was acknowledged that the State's prisons are, to quote the *Sydney Morning Herald:* "Chock-a-block: state's jails bursting at seams" (see Matthew Moore, Edmund Tadros and Malcolm Knox, *Sydney Morning Herald,* 7 December 2008). Indeed, also only last year, the Lord Chief Justice of England and Wales was quoted espousing similar sentiments as reported in *The Independent (UK)* on 3 April:

> *"No one who has committed a criminal offence should be sent to prison when there is an [sic] suitable alternative to custody, the most senior judge in England and Wales said yesterday. Lord Phillips of Worth Matravers, the Lord Chief Justice, called for a greater use of community service or probation, which he said could reduce reoffending and help ease prison overcrowding."*
>
> (See Robert Verkaik, 'Prison should be last resort, Lord Chief Justice insists', 3 April 2008, *The Independent (UK),* http://www.independent.co.uk/news/uk/home-news/prison-should-be-last- resort-lord-chief-justice-insists-803986.html?r=RSS)

[109] Balanced against that view, I am aware and have cited earlier in this judgment the view of theEnglish and Welsh Court of Appeal in ***Morris v Crown Office***

(supra) as well as Belby J in ***Francis*** that the common law power of a Court to commit to prison is unaffected by sentencing legislation in their respective jurisdictions (such as imprisonment should be of last report, particularly for first offenders). I have also noted academic concerns as to such views as raised by O'Neill, Rice and Douglas in ***Retreat from Injustice*** (supra).

[110] Turning now to the penalties to be imposed in relation to each of the Respondents, I have already made findings in relation to the culpability of each of them. I have also made findings concerning the mitigating factors including the subjective features of each Respondent. I have also balanced that against the objective seriousness of what has taken place as well as other objective findings I have made. In doing so, as noted above, I have found the decision of Belby J in ***Francis*** particularly helpful. I must also note that in ***Francis***, Belby J, in turn, found guidance from the judgment of Kirby P (at 741-742) in ***Director of Public Prosecutions v John Fairfax and Sons Ltd & Ors*** (supra) which identified six principles "relevant to cases like the present" (even though for contempt whilst a criminal case was pending) and which I have also used as a guide to assist in my determinations.

2. Netani Vakacegu Rika

[111] Taking into account all I have said, I make the following findings on penalty in relation to **NETANI VAKACEGU RIKA**, Editor in Chief of Fiji Times Limited including the *Fiji Times:*

(a) That I note that I have already made specific findings as to Mr RIKA's culpability such that although Mr RIKA was not the author of the said contemptuous letter, b**y his own evidence, it was his decision, and his alone, to publish it**. As such, although he claims not to have had the same intent as the actual author of the letter, **his culpability in publishing such a scandalous document is high**;

(b) Even accepting that the letter was not Mr RIKA's, in the position he holds comes with it (as Belby J noted in ***Francis***) *"an ability to influence a wide range of public opinion, and hence the need to do so responsibly"*. Hence also the need for the Court to ensure objectively that such conduct (of publishing such a scandalous letter) is both "*emphatically denounced and*

effectively deterred". As Belby J noted in ***Francis***, and as I mentioned in a similar vein at the hearing of the plea, publishing "*robust views in strong and often exaggerated and florid terms"* is not an offence. Mr RIKA is free to do so. That is a matter for him and his employer. But when he makes the decision as the Editor in Chief of the country's oldest (and arguably largest circulation newspaper) to publish a piece (even though originating from a third party) which he knows is not only incorrect factually but (to quote Belby J in ***Francis***) "***in a manner which denigrates and ridicules the system of justice*** *which guarantees that very freedom,* ***he must answer the consequences****"*. As noted by Kirby P in ***Fairfax*** (supra), not only must he be "*emphatically denounced",* he must be *"effectively deterred"*;

(c) **Although acknowledging that it is not necessary in all cases *"that the court proceed to punish the contemnor"*** and *"in some cases … the published findings of the court and an order for costs will be adequate to vindicate the public interest, to punish the contemnor and to deter others*" (as also noted by Kirby P in ***Fairfax***), and as has been similarly suggested by Mr RIKA's Counsel, **in my view this is not an adequate punishment in this case in relation to Mr RIKA when one considers both the serious scandalising of the Court which has taken place combined with Mr RIKA's role in deciding to go ahead and publish**;

(d) In this regard, I must also take into account my findings as to how this scandalous item was published. **Mr RIKA clearly looked at it, did not check it for verification, and decided to run the risk as to publication** thus falling squarely within one of the three categories outlined by Kirby P in ***Fairfax*** (supra), that is:

> (i) Where **a publisher recognises "*that an item has a potential*** *to amount to contempt, and* ***the publisher nonetheless proceeds to publish*** *it";*
>
> (ii) "w*here there is found to be* ***reckless indifference as the effect of the publication****, though it is a contempt";*
>
> (iii) "w*here there is* ***irresponsible conduct amounting to gross negligence****";*

Whatever occurred in Mr RIKA's mind, he decided to publish (either <u>after recognizing</u> that the item **had the "*potential* *to amount to contempt*"** <u>but</u> **<u>nonetheless proceeded to publish</u>** it, or **with either "<u>reckless indifference</u> as to the effect of publication", or by way of "irresponsible conduct" on his behalf "amounting to <u>gross negligence</u>").** Whatever the case, as Kirby P noted in ***<u>Fairfax</u>***, in such situations "***the courts have <u>not</u> considered that a finding of guilt alone is sufficient to punish the contemnor***";

(e) In addition, (as Belby J noted in ***<u>Francis</u>***) where there has been "deliberate conduct", (even if NOT persistent conduct), "*without obtaining appropriate legal advice, though the contemnor is aware of what he was doing, an especially serious view will be taken of the contempt";*

(f) At the same time, I must acknowledge *the "human element"* involved -

(i) into how this offence occurred in a busy newspaper, publishing daily, with a system that placed the ultimate responsibility solely upon Mr RIKA; and

(ii) Mr RIKA's prior good record with some 20 years in the industry without any such offence;

[112] In view of the above findings, I have come to the view that the penalty to be imposed must reflect such findings and, as such, as Tay Yong Kwang J noted in ***<u>Attorney-General v Hertzberg Daniel & Ors</u>*** (supra) there must be:

> *"… **denunciation** (to drive home the point that such behaviour is unacceptable), **specific deterrence** (to prevent a recurrence of such behaviour) **and general deterrence** (to signal to others that such behaviour will be dealt with severely)"* [My emphasis]

[113] Accordingly, I have come to the view that nothing but a custodial sentence must be imposed. As said in the ***<u>Oriental Press Group case</u>*** at paragraph 2:

> *"It is regrettable that we have to sentence for scandalising the court the … newspaper with the widest circulation … and an experienced journalist with an impeccable character. An independent Judiciary and a free press are two vital pillars of our community. If, as in this case, the freedom of the press is abused by the scandalising of the court, both the independence of the Judiciary and the freedom of the press suffer. The rule of law is at risk if public confidence in the Judiciary is weakened. Freedom of expression is endangered if it is abused. Judges are not immune from criticism. They need criticism to*

point out their mistakes and to remind them that they are not infallible. If freedom of expression is to be respected, it must be exercised fairly, reasonably and in good faith. This must be the guiding principle of a responsible and respectable press. In the present case, most unfortunately, freedom of expression has been grossly abused."

[114] Using as my guide the decision of the Fiji Court of Appeal in ***Parmanandam***, the matter is sufficiently serious for a term of imprisonment of three months. Balanced against that, however, I do note Mr RIKA's plea of guilty at the first available opportunity not only saving the Court and community the time and expense of a lengthy defended hearing but also showing Mr RIKA's contrition as to what has taken place. In addition, I must give Mr RIKA credit for his previous unblemished record and that he has acknowledged that he needs assistance and has indeed (as is my understanding of the evidence) with the assistance of Mr GARDNER had an Associate Editor appointed. **Taking into account these mitigating factors, I will impose a custodial sentence of three month's imprisonment to be suspended upon Mr RIKA entering into a bond to be of good behaviour for a period of 2 years as from today.**

[115] On that aspect, I note that Section 29 of the *Penal Code* requires that on passing a suspended sentence the Court shall explain to the offender in ordinary language his liability if during the period of the suspended sentence he commits an offence punishable with imprisonment. Mr RIKA, this means, at as from today if you commit another offence within the next two years punishable with imprisonment, then you will be brought back before the Court and:

(a) the Court may order that the suspended sentence of three months' imprisonment shall take effect;

(b) the Court may order that the sentence of three months' imprisonment shall take effect but with the substitution of a lesser term;

(c) the Court may vary the original sentence of three months' imprisonment by substituting a period expiring not later than three years from the date of the variation.

3. Rex Frederick Gardner

[116] Taking into account all I have said, I make the following findings on penalty in relation to **REX FREDERICK GARDNER**, Chief Executive Officer of Fiji Times Limited and acting publisher of *The Fiji Times*:

(a)That I note that I have already made specific findings as to Mr GARDNER'S culpability of which I was troubled such that although Mr GARDNER was not personally involved in any of the actions or omissions resulting in the offence, the Court is prepared to accept his plea on the basis that he has done so after having received legal advice and his statement upon affidavit that "*I do not wish to shirk any responsibility to be attributed to management of Fiji Times Limited as a result of this error",* that is, with a full consciousness of guilt;

(b) That whilst the Court disagreed for the reasons outlined above with the submissions of Counsel that Mr RIKA might be "let off with a warning" and costs as an adequate punishment, it would seem that in relation to Mr GARDNER that his might be the type of case where (as noted by Kirby P in ***Fairfax***) it is not necessary *"that the court proceed to punish the contemnor"* and "*the published findings of the court and an order for costs will be adequate to vindicate the public interest, to punish the contemnor and to deter others*". In this regard, apart from his minor culpability for which he pleaded guilty at the first available opportunity. I am also mindful of his previous unblemished record that he has never been convicted previously of any offence in any country and during some 40 years' experience in the newspaper industry he has never been previously the subject of committal proceedings for contempt. I also note that an apology was published soon after the matter was brought to the attention of the Fiji Times Limited (even if no personal apology was offered through his Counsel to the Court or to the three judges involved);

(c) That I am further mindful of what a conviction may mean in terms of Mr GARDNER'S visa and continuing employment in the Fiji Islands balanced against his minor culpability for this offence and his impressive record;

[117] In view of the above findings, although I am not going to record a conviction against Mr GARDNER, I must make provision to ensure that there is no repeat of what occurred and that responsibility is not left solely at the feet of Mr

RIKA (with the sword of Damocles' hanging over him on threat of imprisonment). **As such, having regard to the circumstances, including the nature of the offence and the character of the offender, I consider that it is inexpedient to inflict punishment and without proceeding to conviction, I am going to make an order discharging Mr GARDNER *subject to the condition that he enter into a bond without surety be of good behaviour for a period of 12 months as from today.***

[118] Section 41 of the *Penal Code* requires that on passing a conditional discharge the Court shall explain to the offender in ordinary language that if during the period of conditional discharge (that is, the next 12 months) he commits another offence such that he fails to comply with the good behaviour condition which has been imposed, he will be liable to be sentenced for the original offence. Mr GARDNER, this means that as from today for the next 12 months you are to be of good behaviour and if you commit another contempt offence or any serious offence which carries with it as an option a term of imprisonment, you will be brought back before this Court and re-sentenced in relation to this current offence for which I am today discharging you conditional upon your entering a bond to be of good behaviour.

4. The Fiji Times Limited

[119] Taking into account all I have said, I make the following findings on penalty in relation to **THE FIJI TIMES LIMITED** as publisher of *The Fiji Times*:

(a) That although there were procedures in place to assist staff of the newspaper in dealing with potentially contemptuous matters, it is the Court's finding that the system was such that the Fiji Times Limited as publisher of *The Fiji Times* must accept ultimate responsibility for the actions of its staff, particularly where there has been no evidence led that Mr RIKA, as the Editor in Chief, acted outside of or not in accordance with his responsibilities such that the company has sanctioned him personally;

(b) That the system in place had failed, principally because it depended upon one individual, Mr RIKA, making the decision to publish without it being first being "legalled" or discussed with other senior colleagues. Further, there also

seemed to be no system in place to check what had been published the previous day.

(c) That, there was no documentary supporting evidence that in the period between 22 October 2008 when the said scandalous letter was published and when the plea in mitigation was heard on 4 December 2008 that the system had been changed other than the oral evidence of Mr RIKA that an Associate Editor had been appointed and along with others they were involved in the "*review process"*;

(d) That, there was no evidence that in the period between 22 October 2008 when the said scandalous letter was published and when the plea in mitigation was heard on 4 December 2008 -

(i) that the company had undertaken any additional training for their editorial staff; and

(ii), in particular, that the company had amended its contract of employment with Mr RIKA to include (as occurred in ***Francis)*** a provision allowing termination of the contract without notice in the event of Mr RIKA committing a further contempt;

(e) That of further concern, there was no evidence led as to how the system of verification of letters had been changed (other than an Associate Editor being appointed and others involved) such that a member or members of staff at *The Fiji Times* would now have responsibility to ensure *verification* of letters prior to publication, that is, not only that they did comply with the newspapers own guidelines but that they would not offend the law on contempt;

(f) That apart from the published apology, no personal apology was made by Mr McDONALD as the Chairman of the Fiji Times Limited on behalf of the company to the Court and/or any of the three judges personally named in the said contemptuous letter;

(f) At the same time, I must acknowledge the company's and, in particular, the newspaper's prior good record. Even though as Tay Yong Kwang J held in ***Attorney-General v Hertzberg Daniel & Ors*** (supra) that in that case the publishing company (Dow Jones Publishing Company (Asia) Inc) was *"a repeat offender"* and that *"the earlier instances of contempt were committed about two decades ago"* which was *"not a very long period of time in the context of corporate history"*, I do not find this to be the case with the Fiji

Times Limited. The prior committal proceedings mentioned earlier in this judgment in 1991 and 1996 were issued against the newspaper's editor personally in 1991 (for the reporting of a voir dire causing a trial to be aborted); and in 1996 as part of a group of journalists together with a State prosecutor, which was subsequently overturned on appeal to the High Court in 1997. I note that in its nearly 140 years, this is the first occasion in which the newspaper has been before the court for contempt by way of scandalising a court of judge. I have also accepted the evidence of Mr TARTE that the Fiji Times Limited has been previously a good corporate citizen;

(g) I find, however, that the company is not in the same position as Mr GARDNER whose culpability I have found was most minor. The Fiji Times Limited must accept the ultimate responsibility for its staff and its procedures. It cannot shirk its very serious responsibilities in the position it holds in the community by blaming a system which was of its own creation. It has also done little since the offence occurred to convince me that it has taken steps to ensure what occurred is not repeated (other than employing an Associate Editor). I can only reiterate that the allegations made in the letter are extremely serious and go to the heart of the country's system of justice.

[122] In light of the above findings, I have come to the view that the penalty to be imposed must reflect such findings and, as such, to quote again Tay Yong Kwang J in ***Hertzberg Daniel & Ors*** (supra) such allegations:

> *"would immediately cast doubts about the judiciary … and undermine public confidence, among … foreign or local readership in the even-handed administration of justice by our courts. A judiciary which is not impartial and independent is as good as salt that has lost its flavour … impartiality and independence are the judiciary's crucial cornerstones …* ***putting these qualities into question … threatens to bring down the reputation of our country*** *…* ***the present case does warrant the imposition of a fine which will serve the twin functions of being a denunciation of the … [company's] conduct … and, hopefully, of being a deterrence against future transgressions****"* .

[123] Accordingly, I have come to the view that the matter was extremely serious and hence a heavy fine must be imposed. I note that UK£5,000 was imposed in 1968 in ***R v Thomson Newspapers Ltd*** (supra), AU$5,000 in 1987 ***Fairfax***

(supra) and AU$200,000 was imposed in 1987 in ***Wran*** (supra), all cases involving contempt in relation to a specific case that was pending. I further note that for contempt by way of scandalising a court or judge, some of the recent fines have been HK$5million imposed in 1998 in the ***Oriental Press Group case*** (supra), AU$45,000 in 2006 in ***Francis*** (supra), and S$25,000 in 2008 in ***Hertzberg Daniel & Ors***.

[124] As to the amount of the fine to be imposed in this case, I note that Counsel for the Applicant sought FJ$1million but provided no basis as to how he arrived at such a figure, though I note that the HK$5million imposed in the ***Oriental Press Group case*** (supra) is roughly the equivalent of about FJ$1.16 million. I note that Counsel for the Applicant cited the S$25,000 in ***Hertzberg Daniel & Ors*** and that was for a third offence. On my rough calculations again, that is the equivalent of about FJ$30,000.

[125] The penalty to be imposed must reflect the gravity of the contempt. To be clear it has scandalised not only the High Court of Fiji generally but, in addition, specifically three of its most senior judges by name in the country's oldest and largest circulation newspaper. As far as I am aware this is the most serious contempt by a newspaper which has ever occurred in this country, the other contempt cases of newspapers have been for publication of matters in relation to specific pending trials. Although not on the scale of what occurred in the ***Oriental Press Group case*** (supra), I am mindful of what the Court said:

> *"We bear in mind also that fines are intended to punish the offender. They are meant to hurt. A fine which is merely an irritating annoyance represents hardly any punishment at all. In all the circumstances of the case, we believe that the proper fine to impose on the Oriental Press Group Ltd. for its contempt of court relating to the publication of the articles complained of in a newspaper with the largest readership in Hong Kong is one of $5 million. In determining that amount, we have taken into account the order for costs which we propose to make against it."*

[126] Balanced against that, however, I do note the company's plea of guilty at the first available opportunity not only saving the Court and community the time and expense of a lengthy defended hearing but also showing the company's

contrition as to what has taken place. In addition, I must give the company credit for their previous unblemished record and that they have acknowledged that Mr RIKA needs assistance and they have indeed appointed an Associate Editor. **Taking into account these strong mitigating factors, I will believe that a fine of $100,000 is appropriate together with a bond. That is, the company is to enter into a bond (to be entered into in its behalf by its Chairman, Mr McDONALD) in the sum of $50,000 to be of good behaviour for a period of 2 years as from today.**

[127] Mr McDONALD, I am explaining this to you on behalf of the company, that this means, that as from today if the company commits another offence within the next two years, then it will be brought back before the Court and (apart from dealing with the new offence) the Court may order in relation to the present offence that the sum of $50,000 (or a lesser amount) be forfeited.

[128] In relation to the fines, I have previously noted sections 160 and 161 of the *Criminal Procedure Code* which allow for the whole or part of a fine to be paid to any person by way of compensation for any loss or injury caused by such offence. Even though the present case is to protect the Court and the administration of justice, by the very public nature of what has occurred there is no doubt that they have each been severely injured. Despite the nature of that cowardly attack, I do not believe it appropriate to order that any amounts of the fine be paid to them. It would send the wrong message. These proceedings have been concerned with contempt by scandalising the High Court of Fiji and three of its judges because, as was put by the Attorney-General in the ***New Statesman case*** (supra) (at p. 302) (a case referred to the Court by Counsel for the Respondents), "*it was of utmost importance to the administration of justice that public confidence in the judiciary should not be impaired"*. Citing ***Wilmot's "Opinions"*** at page 255, the Court of Appeal in the ***New Statesman case*** agreed endorsing what it referred to as the following *"clear, if rather archaic and stilted, statement of principle"*:

> "***The arraignment of the justice of the Judges*** *is arraigning the King's justice; it is an impeachment of his wisdom and goodness in the choice of his Judges, and* ***excites in the minds of people a general dissatisfaction with all judicial determinations*** *and indisposes their*

> *minds to obey them;* ***and whenever men's [or women's] allegiance to the laws is so fundamentally shaken****, it is the most fatal and most dangerous obstruction of justice, and* ***in my opinion calls out for a more rapid and immediate redress*** *…;* ***not for the sake of the Judges as private individuals, but because they are channels by which the King's justice is conveyed to the people.*** *To be impartial, and to be universally thought so, are both absolutely necessary for … giving justice that free, open and uninterrupted current, which it has, for any ages, found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth."*

[129] So this case has been about contempt by scandalising the Judiciary not about whether or not there has been defamation of three individual judges. The option of commencing their own private civil action is still open to each of the three judges named and there have "been a significant number of libel actions" in the common law world in recent years by members of the judiciary as noted by ***Arlidge, Eady & Smith on Contempt***, D. Eady and A.T.H. Smith (eds), 2nd edn, Sweet & Maxwell, London, 1999, at para 5-209, p. 342. Indeed, two recent cases in Australia come to mind. In 2002 the Deputy Chief Magistrate of the State of Victoria was awarded AU$264,500 in damages after an article questioned "her fitness for office" and accused her "of having acted either illegally, improperly or at least inappropriately": see ***Popovic v Herald & Weekly Times Ltd & Anor (No. 2)*** (Unreported, Supreme Court of Victoria, 21 May 2002, Bongiorno J – judgment on liabiliy); (Austlii: [2002] VSC 174, http://www.austlii.edu.au/au/cases/vic/VSC/2002/174.html); and ***Popovic v Herald & Weekly Times Ltd & Anor*** (Unreported, Supreme Court of Victoria, 6 June 2002, Bongiorno J – judgment on damages); (Austlii: [2002] VSC 220, http://www.austlii.edu.au/au/cases/vic/VSC/2002/220.html). In 2005, Magistrate O'Shane in the State of New South Wales, was initially awarded by a jury AU$220,000 reduced by the Court of Appeal to AU$175,000 in an action against the publishers of the *Sydney Morning Herald* where the jury found an opinion column carried imputations that the Magistrate was biased, incompetent and unfit for office: see ***John Fairfax Publications Pty Ltd v O'Shane*** (Unreported, NSWCA, 17 May 2005, Giles JA Ipp JA Young CJ in Eq); Austlii: [2205] NSWCA 164, http://www.austlii.edu.au/au/cases/nsw/NSWCA/2005/164.html);

and ***John Fairfax Publications Pty Ltd v O'Shane (No 2)***, (Unreported, NSWCA, 31 August 2005); Austlii: [2005] NSWCA 291, http://www.austlii.edu.au/au/cases/nsw/NSWCA/2005/291.html) . It would be inappropriate of me to comment further on this course of action. That is a matter for the three judges themselves.

5. Costs

[130] In relation to the costs of the current proceedings, I note that Counsel for the Applicant is seeking indemnity costs. I note that indemnity costs were awarded in the ***New Statesman case*** (supra) but that was the only punishment. It is cannot be said for certain from many of the other contempt matters where costs were ordered whether this was on an indemnity or party to party basis, though most seemed to be of the latter.

[131] In my view, for indemnity costs to be awarded, there would need to be conduct which could be pointed to by the Applicant whereby the Respondents "had acted wholly unreasonably in connection with the hearing" and such conduct would need to be "reprehensible conduct" to signify the Court's condemnation as to the way the Respondents have conducted the litigation as I discussed recently in ***Singh v Naupoto*** (Unreported, High Court of Fiji at Suva, Civil Action No: HBC199 of 2008, 4 July 2008, Hickie J; Paclii: [2008] FJHC 137, http://www.paclii.org/fj/cases/FJHC/2008/137.html) and ***Rokotuiviwa v Seveci,*** (Unreported, High Court of Fiji at Suva, Civil Action No: HC374 of 2007, 12 September 2008, Hickie J); Paclii: [2008] FJHC 221; http://www.paclii.org/fj/cases/FJHC/2008/221.html) citing ***Police Service Commission v Naiveli*** (1995) HBJ 029 of 1994, 4 September 1995, Scott J; and Civil Appeal No. ABU0052 of 1995S, 16 August 1995, Casey, Ward and Handley JJA); see ***Dewa v University of the South Pacific*** (Unreported, High Court of Fiji at Suva, No.HBJ0007J of 1994, 4 July 1996) (Paclii: [1996] FJHC 125, http://www.paclii.org/fj/cases/FJHC/1996/125.html); ***Heffernan v Byrne & Ors***, (Unreported, HBM 105 of 2007, 24 October 2007, Pathik J - Application for Recusal dismissed for want of prosecution) (Paclii: [2007] FJHC 138, http://www.paclii.org/fj/cases/FJHC/2007/138.html); and 11 April 2008 (Application to Strike Out Motion for Constitutional Redress granted)

(Paclii: http://www.paclii.org/fj/cases/FJHC/2008/154.html; and ***Heffernan v Byrne & Ors***, Civil Appeal No.ABU0027 of 2008, Hickie JA, 29 May 2008 (Application for Leave to Appeal withdrawn) (Paclii: [2008] FJCA, http://www.paclii.org/fj/cases/FJCA/2008/7.html).

[132] Despite the circumstances of the offence, I have not found no evidence of "reprehensible conduct" in the way the litigation has been conducted in relation to the present proceedings before me. Pleas of guilty were entered at the first available opportunity and I commend Counsel for the Respondents on his helpful and detailed submissions even though I may not have agreed with everything that he has submitted. **Therefore, it is the finding of the Court that there is no basis for an award of indemnity costs.**

[133] I will adjourn this aspect of the matter for 28 days to allow the parties to attempt to reach an agreement on the amount of costs to be paid. The parties are to appear before me again at 8.30am on 19 February 2009 when I will either hear argument and then fix an amount for costs or receive confirmation of any agreement. At this point, I wish to publicly thank again Counsel who appeared for both the Applicant and Respondents for their professionalism in their submissions and the way they have conducted this matter.

J. CONCLUSION

[134] In conclusion, I wish to make four final points. First, I note that the Application only sought for the Respondents to be dealt with for contempt in terms of scandalising a court or judge and not, in addition, for attempting to interfere with ongoing proceedings. Judgment had been given in the High Court just under a fortnight before the letter was published in *The Fiji Times*. Although at the time of publishing the letter, an appeal had not been formally lodged, the Plaintiffs had indicated that was their intention. Once that was clear, then, on one view, commentary should have been circumspect.

[135] Second, I note that an appeal was formally filed on 11 November 2008 from the judgment of the High Court in the ***Qarase v Bainimarama*** case. It is now pending to be heard before the Fiji Court of Appeal and, bar any

complications, I have been asked to call it over tomorrow for it to be listed with the consent of the parties to be heard as from 6 April 2009. As a consequence, published commentary should not be appearing in relation to it other than noting that it has been listed, and, at the relevant time when the appeal is heard, media reports should concentrate solely on the proceedings as they take place each day. As to what SHOULD be the outcome, that is a matter for the judges hearing the case to decide, not to be pressured by the parties, lawyers, the media, politicians, academics or "ravings of a ratbag" by way of an opinion column, letters to the editor, on talkback radio, on television or on websites. In the interests of justice to the parties in that case, all citizens are expected to respect the process and let justice take its course. The penalties for contempt in this form can be severe.

[136] I might also add that publication on internet sites may leave not only the authors of contemptuous material but also the publishers of those sites (and quaere the role of host providers) exposed to both contempt and possibly defamation proceedings even where the material allegedly originates from overseas. In relation to possible defamation actions arising from material posted on websites, the decision of the High Court of Australia in ***Dow Jones and Company Inc v Gutnick*** 210 CLR 575; Austlii: [2002] HCA 56, http://www.austlii.edu.au/au/cases/cth/HCA/2002/56.html) should be a warning to all.

[137] Third, let me be clear as to the legal appeal process in Fiji for those members of the public who may have been mislead by some of the nonsense espoused by bizarre so-called "legal advice" and "legal opinions" concerning avenues of appeal which were reported post the High Court judgment in the ***Qarase v Bainimarama*** case. After a judgment has been delivered by the High Court of Fiji, parties can appeal to the Fiji Court of Appeal and then, if leave be granted, the final avenue of appeal is to the Supreme Court of Fiji. There is no further right of appeal to an overseas court. Appeals to the Privy Council were done away with following Colonel Rabuka's second coup d'état in 1987. That decision was subsequently ratified in the 1990 and 1997 Constitutions. The Fiji Islands today is an independent sovereign nation.

[138] One can only hope, therefore, that those who have been misleading the public as to avenues of appeal such as to the International Criminal Court or International Court of Justice would desist. **The International Court of Justice resolves matters of international law between sovereign states.** For more on its jurisdiction can I suggest members of the public look at its web site: http://www.icjcij.org/jurisdiction/index.php?p1=5&PHPSESSID=900486b56bb4a685b4bd81f349cdde1. **As for the International Criminal Court, similarly, *"the ICC only tries those accused of the gravest crimes"*** as its web site notes:

> *"The International Criminal Court (ICC) is an independent, permanent court that tries persons accused of the most serious crimes of international concern, **namely genocide, crimes against humanity and war crimes**."*
>
> (See International Criminal Court, "About the Court", http://www.icc-cpi.int/about.html)

[139] My fourth and final point is that Fiji, both as a country and as an emerging nation in the first decade of the 21st century is, obviously, at the cross-roads. Some of the commentary I have heard over the past year, and, in particular, since the handing down of the judgment in the ***Qarase v Bainimarama*** case in relation to the Judiciary has been, to put it mildly, just disgraceful. Sadly, this has been particularly so from some of those who should know better and who see themselves as amongst the leaders of this country in politics, the law, the media or academia. I might also add that some of the perpetrators of such misinformation have not just been from this country alone. No wonder some members of the public are confused and think that it is somehow "open season" on the Judiciary such that if some of "the leaders" can do it without any restraint, decorum or fear of subsequent penal sanctions, then any amount of bile can be thrown. Perhaps, as an example of how low matters have been allowed to sink was that at the time of concluding the hearing of the plea in mitigation in this matter on 4 December 2008 the clerk who was with me that

day in Court was approached by a person claiming to be an Australian journalist seeking to interview me in my Chambers (and apparently handing to the clerk his business card to give to me). Needless to say, I did not grant any such interview. Rather, shocked as I was when I was handed the card by the clerk and told what had happened, I simply noted that the card was indeed from a person claiming to be from an Australian news organisation, and then just handed it back to the clerk asking him to inform the journalist that in the Fiji Islands, as in Australia, we still respect the rule of law. Can one imagine a journalist even contemplating to attempt a similar scenario in Australia or New Zealand?

[140] As with all countries, the Fiji Islands today has many problems: health, education, infrastructure to name just a few. The rule of law does not sit somewhere "out there" in a vacuum whilst inequalities exist all around us. The rule of law is a living, breathing ideal inside each of us to do what we know to be right. Despite the pessimism portrayed by some, I hold great hope for the people of this wonderful country, particularly the young people, as the coming together over the past fortnight in a time of national crisis to provide assistance for those affected by the current floods has shown.

[141] Let me conclude with a quote from Papua New Guinea and the judgment of Wilson J in 1979 in ***Rooney (No 2)***:

> *"The independence of the judiciary is guaranteed by the Constitution … The Constitution provides the protective safeguards of judicial independence … The independence of the judiciary is the key to freedom under the law …* ***The Judicial Declaration that each member of the judiciary is required, by … the Constitution, to make before entering upon the duties of, or exercising any of the powers of, his [or her] office is inconsistent with there being any erosion of the concept of the independence of the judiciary*** *…* ***By virtue of the making of such a declaration independence becomes a vital part of a judge's judicial integrity*** *... Most crucial in a sovereign, independent and democratic nation is the watchful presence of independent and fearless judges able and willing to do justice between citizen and State according to the law and vigilant to ensure that the State and its officers do not exceed their legal powers … The essence of independence is that the judge, in the discharge of his [or her] functions, reaches his[or her] decisions because his [or her] analysis, legal knowledge and understanding, his [or her]*

training, his [or her] system of values as has been discovered by him [or her] in the jurisdiction where he [or she]is serving, and no-one else's, lead him [or her]to particular conclusions. That independence is demonstrated in the judge's refusal to submit to any external pressures to reach conclusions different from those which, in his [or her] evaluation of the law and interpretation of the material before him [or her], appear to be the right ones. ***It is also demonstrated when in an appropriate case the protective sanctions are applied.*** *It is not being suggested that the judge should insulate himself [or herself] from his [or her] community. He [or she] must be sensitive to social trends, be prepared to listen to informed criticism of his [or her] decisions, particularly on the interpretation of the law, and above all to adopt a critical approach towards his [or her] own functions and responsibilities in times of social change.*

Judicial independence at its heart derives from the judge's own determination to be free to make up his [or her] own mind in the end. The purpose of such independence … is to entrust to suitably equipped individuals in whom general confidence lies the resolution of conflicts according to standards embodied in the Constitution and the rules of law. ***Such confidence derives from the assurance that those individuals are not responsible to any of the parties interested in the outcome of the decision****."* [My emphasis]

[142] **The Orders of the Court shall be as follows**:

(a) **NETANI VAKACEGU RIKA**, as the Editor in Chief of Fiji Times Limited including the *Fiji Times* you have pleaded guilty to contempt of scandalising the High Court of Fiji and three of its judges. ***You are hereby convicted of that contempt and I Order that you be committed to prison for three month's as from today, such term of imprisonment to be suspended upon your entering into a bond to be of good behaviour for a period of two (2) years as from today*;**

(b) **REX FREDERICK** GARDNER, as the Chief Executive Officer of Fiji Times Limited and acting publisher of *The Fiji Times*, you have pleaded guilty to contempt of scandalising the High Court of Fiji and three of its judges. Having regard, however, to the circumstances, including the nature of the offence and the character of the offender, I consider that it is inexpedient to

inflict punishment and without proceeding to conviction, ***I Order that you be discharged subject to the condition that you enter into a bond without surety be of good behaviour for a period of 12 months as from today;***

(c) In relation to **THE FIJI TIMES LIMITED as publisher of *The Fiji Times,*** I note that its Counsel has entered a plea of guilty on its behalf to contempt of scandalising the High Court of Fiji and three of its judges. ***The company is convicted and I Order as follows –***

(i) that it be fined the sum of $100,000 to be paid within 27 days of today. The case will be called before me in 28 days time to ensure that the Order regarding the payment of the fine has been complied with in full. If it turns out that full payment has not been made before that date, then I will make further appropriate orders for non-compliance;

(ii) In addition, I Order that the company is to enter into a bond (to be entered into on its behalf by ROSS GEORGE McDONALD, Chairman of Fiji Times Limited), in the sum of $50,000 to be of good behaviour for a period of 2 years as from today and I will allow the company 27 days from today to deposit the security of $50,000 with the Court in relation to that bond. Compliance with this Order will also be checked by this Court in 28 days from today. If it turns out that the full payment of the bond has not lodged before that date, then I will make further appropriate orders for non-compliance.

(d) The matter is adjourned before me until 8.30am on Thursday, 19 February 2009.

Thomas V. Hickie

Judge

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