IN THE FIJI COURT OF APPEAL
Criminal Jurisdiction
Criminal Appeal No. 62 of 1977

MAEKE TAUMATOA — Appellant

v.

REGINAM — Respondent

P.A. Coombe for the Appellant
J.F.W. Judge, Attorney-General, for the Respondent

Date of Hearing: 10th March, 1978
Delivery of Judgment: 22nd March, 1978

JUDGMENT OF THE COURT

Gould V.P.

The appellant was convicted in the High Court of the New Hebrides at Vila of the offence of manslaughter contrary to section 179 of the Penal Code Regulation, 1973, on the 30th November, 1977, and was sentenced to fourteen years' imprisonment. This appeal is brought against both conviction and sentence.

The appeal against conviction is confined entirely to a challenge to the jurisdiction of the High Court and it is necessary to give a brief summary of the proved or admitted facts relevant to this question. The appellant is a Gilbertese and therefore a British subject by nationality. He and the deceased, who was

a New Hebridean were passengers in a ship, the "Biliki", which on the 9th May, 1977, left Port Vila, en route for Epi, one of the other islands in the New Hebrides group. The "Biliki" was not registered as a ship in any country, and was owned by one Fung Kwei, of unknown nationality, and by the captain, Harry Michel, a New Hebridean, who owned 51% of the shares. By section 1 of the Merchant Shipping Act, 1894, a ship shall not be deemed to be a British ship unless wholly owned by British subjects (or some bodies corporate). The learned Judge was therefore satisfied that the "Biliki" was not a British ship, and was accordingly a foreign ship.

On the evidence the learned Judge found it proved beyond reasonable doubt that, during the voyage the appellant threw or "capsized" the deceased backwards over the rail of the vessel and into the sea, causing his death by drowning or otherwise; he found the appellant was guilty of the offence charged.

The learned Judge then turned to the question of jurisdiction and held that the evidence did not establish beyond reasonable doubt that the offence was committed within the territorial waters of the New Hebrides. Had it been otherwise, it was considered that the Court would have had jurisdiction by virtue of section 5 of the Penal Code (Queen's Regulation No.9 of 1973) and section 34(b) of the Criminal Procedure

Code (Cap.3: O.R. No.4 of 1962). This ground having failed, the learned Judge then considered the second ground upon which jurisdiction was asserted i.e. section 686 of the Merchant Shipping Act, 1894. That section (we have deleted certain words which are not relevant) reads as follows:-

> "686. (1) Where any person, being a British subject, is charged with having committed any offence ..... on board any foreign ship to which he does not belong ..... and that person is found within the jurisdiction of any court in Her Majesty's dominions, which would have had cognizance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that could shall have jurisdiction to try the offence as if it had been so committed.
>
> (2) Nothing in this section shall affect the Admiralty Offences (Colonial) Act, 1849."

It was argued for the appellant that this section did not apply because the New Hebrides was not part of Her Majesty's dominions.

In deciding this issue and holding that the High Court had jurisdiction, the learned Judge relied strongly on section 14 of the New Hebrides Order, 1975, which expressly declares "for the avoidance of doubt" that the Merchant Shipping Act 1894 (section 686) "shall extend and apply to the High Court and to the New Hebrides to the extent of Her Majesty's jurisdiction". The learned Judge expressed his finding thus:

" Accordingly, as section 686(1) of the Merchant Shipping Act 1894 applies to the British Jurisdiction in the New Hebrides and this Court, I hold that this Court has jurisdiction to try the accused for the present offence for the reasons that all the other necessary conditions mentioned in the subsection of that section of that Act are present, namely, (1) the accused is a British subject, (2) the "Biliki", the vessel on which the present offence was committed was at the material time a foreign ship, (3) the accused did not belong then to the said ship since he was only a passenger thereon, and (4) this Court would have had cognizance of the present offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction."

On this appeal Mr. Coombe, for the appellant, renewed his challenge to the jurisdiction under section 686(1) of the Merchant Shipping Act on the ground taken in the Supreme Court, and sought and obtained leave to add a further ground, namely that the section did not apply because the appellant was a person who did belong to the foreign ship in question. At the request of the Court Mr. Coombe summarized his submissions as follows:

"1. That the High Court of the New Hebrides is not "a court in Her Majesty's Dominion" by reason of:-

(a) the specific definition of the term "Her Majesty's dominion" contained in the Schedule to the New Hebrides Interpretation and General Clauses Regulation (Cap.1) 1971;

(b) the specific wording of section 5 of the Foreign Jurisdiction Act 1890 (U.K.) and of Article 14 of the New Hebrides Order 1975 S.I. No. 1514 of 1975;

(c) it is contended that there is a fatal omission in the explicit wording of Article 14 of the said New Hebrides Order 1975 which cannot be cured by the Court on the grounds of:-

(i) the principles of general statutory interpretation;

(ii) that such an attempt would be repugnant to the specific wording of the Anglo-French Protocol of 1914 imported into the municipal law of England as applicable in the New Hebrides by the New Hebrides Order 1975.

2. That the Appellant "belonged" to the foreign ship upon which the incident occurred within the meaning of section 686(1) of the Merchant Shipping Act 1894 (U.K.) and consequently is not amenable to the jurisdiction of the High Court of the New Hebrides."

On the question whether the High Court is a court in Her Majesty's dominions, the definition of that phrase in the Interpretation and General Clauses Ordinance (Cap.1) is -

"means all the territories under the sovereignty of the Crown and the territorial waters thereof;"

This definition, it was submitted, did not include the New Hebrides, because it was not a territory under the sovereignty of the Crown. The status of the New Hebrides was regulated by the Anglo-French Protocol of the 6th August, 1914, which was given the force of law and declared binding on all persons in the New Hebrides over whom Her Majesty should have jurisdiction, by section 2 of Schedule 1 of the New Hebrides Order, 1973. Section 2 also

provides that the provisions of the Order and all laws made thereunder shall be read and construed subject to the terms of the Protocol in all respects. Section 1 of Article 1 of the Protocol reads:-

> "1. The Group of the New Hebrides, including the Banks and Torres Islands, shall form a region of joint influence, in which the subjects and citizens of the two Signatory Powers shall enjoy equal rights of residence, personal protection, and trade, each of the two Powers retaining sovereignty over its nationals and over corporations legally constituted according to its law for the purpose of carrying on agricultural, industrial, commercial or other enterprises, and neither exercising a separate authority over the Group."

It was Mr. Coombe's submission that this Article precludes any possibility of a claim of sovereignty by Her Majesty over the territory of the New Hebrides and that therefore it cannot be part of Her Majesty's dominions and the High Court is not a court in Her Majesty's dominions.

The argument continues in relation to Article 14 of the New Hebrides Order, 1975, upon which the learned Judge relied, and which, on the face of it, is strongly contrary to counsel's submission. It reads:

> "14. For the avoidance of doubt it is hereby declared that the following enactments, that is to say -
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> The Admiralty Offences (Colonial) Act 1849(c),
> The Admiralty Offences (Colonial) Act 1860(d),
> The Evidence Act 1851(e) (sections 7 and 11),

> The Foreign Tribunals Evidence Act 1856(f),
> The Evidence by Commission Act 1859(g),
> The British Law Ascertainment Act 1859(h),
> The Foreign Law Ascertainment Act 1861 (i),
> The Evidence by Commission Act 1885(j),
> The Merchant Shipping Act 1894(k) (section 686),
>
> shall extend and apply to the High Court and to the New Hebrides to the extent of Her Majesty's jurisdiction, and references to the Governor of a Colony, to a Supreme Court or a judge of a Court of a Colony or to a Superior Court in a Colony shall be construed as references to the Resident Commissioner, the High Court or a judge, as the case may be "

Thereby section 686 of the Merchant Shipping Act, 1894, is extended and applied to the High Court and the New Hebrides, to the extent of Her Majesty's jurisdiction. Power to do this is vested in Her Majesty in Council by section 5 of the Foreign Jurisdiction Act, 1890, one of the acts pursuant to which the order was made; Schedule 1 of that Act included section 11 of the Merchant Shipping Act, 1867, which was replaced by section 686 of the 1894 Act; the power given by section 5 extends to enactments amending or substituted for the enactments specified in the Schedule, and therefore to section 686.

It is Mr. Coombe's contention that it was a fatal omission that Article 14 did not contain words such as those we have underlined in Article 13, which reads:

> "13. The Colonial Prisoners Removal Act 1884(b) shall apply to the New Hebrides to the extent of Her Majesty's jurisdiction as <u>if it were a British possession and part of Her Majesty's dominions</u>, and reference to the Governor of a British possession shall be construed as references to the Resident Commissioner."

Some such phraseology, it was contended, was necessary in Article 14 to displace the effect in section 686 of the words "within the jurisdiction of any court in Her Majesty's dominions".

We agree with the learned Attorney-General, who appeared for the respondent, that the arguments of counsel for the appellant, under this head, fail. The jurisdiction of the High Court is expressed in the 1975 Order in Council. First, by Article 11, it is to have the like jurisdiction as the previous High Court had in relation to the New Hebrides. That court was the High Court of the Western Pacific exercising jurisdiction under the Western Pacific (Courts) Order in Council, 1961. It had all the jurisdiction of the High Court of Justice in England. It also exercised Admiralty Jurisdiction and that the present High Court succeeded to that jurisdiction is made clear by Article 12 of the 1975 Order and by Article 14, which, in case there should be doubt, applied the Admiralty Offences (Colonial) Acts of 1849 and 1860.

Then by Article 14 Her Majesty in Council extended section 686 of the Merchant Shipping Act, 1894, to the New Hebrides as a foreign country to the extent of her jurisdiction therein. But she also ordered that the section would extend and apply to the High Court. The only reference to a court in section 686 is in the phrase "within the jurisdiction of any court in Her Majesty's dominions". Hence it is

quite clear that the Order in Council was substituting the High Court for "any court in Her Majesty's dominions". Section 5 of the Foreign Jurisdiction Act, 1890, gives power to do this. Its text is:-

> "5.(1) It shall be lawful for Her Majesty the Queen in Council, if She thinks fit, by Order to direct that all or any of the enactments described in the First Schedule to this Act, or any enactments for the time being in force amending or substituted for the same, shall extend, with or without any exceptions, adaptations, or modifications in the Order mentioned, to any foreign country in which for the time being Her Majesty has jurisdiction.
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> (2) Thereupon those enactments shall, to the extent of that jurisdiction, operate as if that country were a British possession, and as if Her Majesty in Council were the Legislature of that possession."

Subsection 2 results in the New Hebrides being deemed a British possession to the extent of Her Majesty's jurisdiction, and a British possession, by virtue of section 18 of the Interpretation Act, 1889, is a part of Her Majesty's dominions. In our opinion the manifest intention of the Order in Council pursuant to the explicit powers conferred by section 5(1) was to modify section 686 in this way and that no other construction is possible. We would add that the explanation tendered by the Attorney-General for the use of the fuller form of words in Article 13 of the 1975 Order, that the Colonial Prisoners Removal Act, 1884, did not appear to the Schedule to the Foreign Jurisdiction Act, 1890, appears to us to be acceptable.

We do not find any force in the argument (if it was so intended) that there was an assumption of jurisdiction contrary to the provisions of the Protocol of 1914. No territorial claim was being made but merely a claim of jurisdiction to try a British subject. The position under the Protocol is put thus in Halsbury's Laws of England (4th Edn) para. 1154:-

> "That the territory is a region of joint influence in which the subjects and citizens of Great Britain and France respectively shall enjoy equal rights of residence, personal protection and trade, each protecting state retaining jurisdiction over its own subjects and citizens and neither state exercising a separate control over the territory."

Nothing that occurred was in breach of this principle.

We come to the second ground of appeal i.e. that the appellant was not a person to whom, on the facts, the phrase "ship to which he does not belong" was rightly applied. The learned Judge found simply that the appellant did not belong to the ship because he was only a passenger: the question does not appear to have been made the subject of argument in the High Court.

Mr. Coombe relied upon Bligh v. Simpson the Fusilier (1865) 3 Moore N.S. 51; 16 E.R.19. That was a salvage case and it was necessary to construe section 458 of the Merchant Shipping Act 1854; we take the relevant portion of the section from the English Report at p.27 -

> "Whenever any ship or boat is stranded or otherwise in distress on the shore of any sea or tidal water situate within the limits of the United Kingdom, and services are rendered by any person, - (1.) In assisting such ship or boat; (2.) In saving the lives of the persons belonging to such ship or boat; (3.) In saving the cargo or apparel of such ship or boat, or any portion thereof; And whenever any wreck is saved by any person other than a Receiver within the United Kingdom; there shall be payable by the owners of such ship or boat, cargo, apparel, or wreck, to the person by whom such services, or any of them, are rendered, or by whom such wreck is saved, a reasonable amount of salvage,...."

Originally no salvage was payable for saving lives; then an allowance was made if there was salvage of either ship or cargo. When the above legislative provision came to be construed it was argued in the Court of Admiralty but "barely mentioned" in the Privy Council that the persons saved were passengers, and were therefore not, in terms of the Act, - "persons belonging to such ship". In rejecting the argument Lord Chelmsford said:-

> "It would be strange indeed if an Act intended to encourage and reward the saving of life which is in peril in consequence of the distress and danger of the vessel in which it is embarked, should be construed so as to make a distinction between those who were on board in different capacities and different relations to the vessel. It is a sufficient answer to such an objection to say that nothing is more common in popular language than to speak of "the passengers belonging to such a vessel". The salvors, therefore, are entitled to a reasonable amount of salvage for the services rendered in saving the lives of the passengers on board the Fusilier,....."

No other authority bearing on the question has been cited by counsel.

The learned Attorney-General called attention to the fact that the wording of section 458 of the Merchant Shipping Act 1854 was altered when it was replaced by section 544 of the Merchant Shipping Act, 1894. The reference to passengers has been dropped entirely and the words are simply "... services are rendered ..... in saving life from any British or foreign vessel." It is pointed out also that the predecessor of section 686 of the Merchant Shipping Act, 1894, was section 11 of the 1867 Act and that the words "foreign ship to which he does not belong" are used in both sections; there has been no change. This may have been from a desire to clarify the salvage section if it was thought that the "offence" section should be construed otherwise.

Another form of words is used in section 685 of the 1894 Act where jurisdiction is given, "over all persons on board that vessel or for the time being belonging thereto". These words, though they appear immediately before section 686 are not decisive of the question, though they convey the idea of a distinction between those having a close association with the vessel, e.g. the crew, and others.

One thing is clear (and we think the change of wording just referred to as between the 1854 Act, section 458, and the 1894 Act, section 544, emphasizes this conclusion) and it is that the reasoning behind the finding in Bligh v. Simpson does not apply to section 686. Lord Chelmsford found that in an Act

to reward saving of life in peril it would be strange to divide those on board into different categories. But where the concern is with the jurisdiction over people on a foreign ship in the high seas or in a foreign port there is great need to make such a distinction. The foreign ship is normally the equivalent of foreign territory: it is not within the local jurisdiction of the court concerned and the only basis upon which the court can assert jurisdiction is that the person accused is a British subject; moreover he must have come within the court's jurisdiction. He may have done so, as a member of the crew. The limitation to British subjects would be pursuant to international law and comity; a foreign power is entitled not to be interfered with in operating its own ships. But should not the line be drawn at that point?

Passengers are associated with ships and will have entered into contracts of carriage. But those are temporary matters, financially beneficial but not essential to the operation of the ship. The relationship would most probably be terminated by the time the jurisdiction of a British court was being asserted: whereas a member of the crew would be expected to remain with the ship on its journeys in and out of port. Such a crew member is in a true sense a part of the ship. We think, that a passenger cannot be said to "belong" to a ship within section 686. If it were otherwise, the effect of the section would be limited to visitors and stowaways. For these reasons we consider that the learned Judge was correct when he held that the

appellant did not "belong" to the "Biliki". All grounds of appeal against conviction accordingly fail and the appeal is dismissed.

There remains an appeal against the sentence of fourteen years' imprisonment imposed by the learned Judge. As we have said before, we acknowledge fully the advantage that a judge sitting in the locality has in the matter of sentence over this Court which necessarily sits at a considerable distance. At the same time it is manifest, we think, that fourteen years' imprisonment is a very heavy sentence by any standard. The learned Judge said:

> "What actually happened before the accused deliberately and intentionally threw Willie Ben into the sea is not known, the person who knows what happened is the accused himself. His explanation in Court that he pushed away Willie Ben in self-defence as a result of which the latter fell overboard has been rejected as being untrue in view of the prosecution evidence which was accepted. I can only infer or surmise that there must have been some form of altercation or difference or fight between the two, as a result the accused deliberately and intentionally threw Willie Ben in the sea as described by the prosecution witnesses whom I believed. Accused in the circumstances did something intentional and unlawful, something more than what he was justified to do. Even if I were to accept that Willie Ben attacked him in the way described by the accused himself, the accused was not justified in the circumstances to throw Willie Ben overboard. He could have retreated, he could have hit back but not deliberately got hold of him and threw him into the sea. The circumstances of the case amount to a little less than murder, at least. I surmise that the prosecution did not charge him for murder because of a possible element of provocation. Accused is a young man of 26, previous good record."

It is not clear that the learned Judge in fact accepted that there was an attack by the deceased but he does not rule out an element of provocation. It is justifiable, we think, to take note of what we were informed by the learned Attorney-General was the attitude of the prosecution; it seems that the deceased was a strong swimmer and the vessel not a great distance from land. The prosecution took the view that highly dangerous though the act of the appellant was, it was possible that he may not have thought that it would inevitably end in death. We think that in the circumstances a sentence of eight years' imprisonment would have been adequate and appropriate; we therefore allow the appeal against sentence and substitute for that of fourteen years a term of eight years' imprisonment to run from the same date as the original.

(Sgd.) T.J. Gould
VICE PRESIDENT

(Sgd.) C.C. Marsack
JUDGE OF APPEAL

(Sgd.) T. Henry
JUDGE OF APPEAL