IN THE HIGH COURT OF FIJI

AT LAUTOKA

MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO. HAM 30 OF 2017

BETWEEN : THE STATE

APPLICANT

AND: RATU EPELI NIUDAMU & 15 OTHERS

RESPONDENTS

Counsel: Mr. Lee Burney with Mr. S. Babitu for Applicant

Mr. K. Tunidau for 1st Respondent

Mr. A. Ravindra Singh for 2nd to 16th Respondents

Date of Ruling: 27th February 2017

PRE-TRIAL ORDER CONCERNING THE ELEMENTS OF THE OFFENCE OF SEDITION

Introduction

1. The Respondents are charged with Sedition and Inciting Communal Antagonism contrary to Section 67 (1) (a) and Section 65(2) (a) respectively of the of the Crimes Decree 44 of 2009.

2. Pursuant to Section 290 Criminal Procedure Decree 2009 and having regards to the objectives of Part XVIII of the Criminal Procedure Act 2009, the State (The Applicant) seeks a pre-trial order with a view to clarifying the triable issues in order to protect the interests of the parties and to ensure that a fair trial is facilitated.

3. Counsel for Respondents do not object to the application. However, the submission filed in response by the Counsel for 1st Respondent Mr. Tunidau takes a contrasting view in respect of triable issues proposed by the Applicant, particularly in respect of *mens rea* of the offence of Sedition.

4. An exploration of case law of Fiji and common law reveals that the definition of the offence of Sedition is shrouded in controversy. It was noted by Scott J in *DPP v Afasio Mua and Others Criminal Appeal No 27 of 1990* (unreported) that *"probably no crime other than sedition has been left in such vagueness of definition"*.

5. In such a context it is desirable in the interests of justice that, before embarking on a lengthy trial, the triable issues, including elements of the offence and the proper scope of the so-called statutory defences are clearly identified and demarcated to facilitate a fair trial.

The Applicant's Position on Elements of Offence

6. The Counsel for Applicant Mr. Burney takes the view that offence of Sedition contrary to Section 67 of the Crimes Decree 2009 falls within a category of offences not requiring proof of a mental element or *mens rea* beyond proof of a deliberate act. He argues that ....'*the seditious intention forms part of the actus reus of the offence and therefore the prosecution is not required to prove specific intent - it is sufficient to prove that the accused deliberately did an act and that the act was seditious. It is for the fact finder to determine, applying an objective test, whether the act was done with a seditious intention as defined in Section 66 Crimes Act*'.

7. It is further submitted that evidence of the surrounding circumstances is relevant and admissible on the question whether the act is, viewed objectively, seditious. However, evidence of the accused's intention or motive is irrelevant to that question and therefore inadmissible.

8. To support his argument, Mr. Burney has cited a number of case authorities from English Common Law, Privy Council and High Court of Australia.

9. A much reliance is placed on the majority decision of the House of Lords in ***Reg v Lemon*** *[1979] 2 W.L.R. 281.* House of Lords in ***Lemon*** (supra) held (Lord Edmund Davies and Lord Diplock dissenting) that guilt of the offence of publishing a blasphemous libel did not depend on the accused having an intent to blaspheme.

10. Their Lordships agreed that criminal libel in its four manifestations – seditious, blasphemous, obscene and defamatory fell into a same category and *in the matter of "mens rea" all four species of criminal libel (seditious, blasphemous, obscene and defamatory) should be the same.* Therefore, Mr. Burney submits that the majority decision in ***Lemon*** (supra) is relevant and a persuasive authority in deciding the elements of the codified version of the offence of Sedition in Fiji.

11. Viscount Dilhorne's masterly speech which expressed the majority decision traces the history of the kindred offence of seditious libel and notes that prior to 1792 on a charge of publishing a seditious libel the only questions left to the jury were (1) did the matter published bear the meaning ascribed to it in the indictment or information? And (2) was it published by the defendant? In other words, Viscount Dilhorne found that, prior to 1792, the specific intent of the accused was not an ingredient of the offence.

12. Viscount Dilhorne's speech eventually concludes that the ingredients of the offence of publishing a blasphemous libel have not changed since 1792 and the guilt of the offence does not depend on the accused having an intent to blaspheme, but on proof that the publication was intentional and that the matter published was blasphemous. **Without expressing a concluded view, Viscount Dilhorne however acknowledged that it may be that the development of the law as to seditious libel has taken a different course.**

13. Lord Scarman agreed with Viscount Dilhorne's historical analysis of the case law. **He also acknowledged that the view of the minority that specific intent**

must be proved has great persuasive force. In Lord Scarman's view, however, the history of the law is obscure and confused and the point was therefore open for their Lordship's decision as a matter of principle. He approached the point on the basis of what is required of the law in contemporary society. Lord Scarman also accepted there is some force in the conceptual argument that:

> *"in the matter of "mens rea" all four species of criminal libel (seditious, blasphemous, obscene and defamatory) should be the same. It is said that an intention to stir up sedition is necessary to constitute the crime of seditious libel. I am not sure that it is or ought to be.".*

14. By analogy with the test of obscenity, Lord Scarman concluded that, as far as blasphemy is concerned, *"The character of the words published matter, but not the motive of the author or publisher."*

15. Counsel for Applicant in order to further strengthen his position has cited two case authorities from two different Commonwealth jurisdictions where statuary provisions have created the offence of Sedition in similar terms to the statutory offence under the Crimes Decree 2009.

16. In ***Wallace-Johnson v R*** *[1940] All E.R. 241* the Privy Council held that no extrinsic evidence of seditious intention was required under the Gold Coast Colony Statutory provision.

17. In ***Cooper v the Queen*** *105 C.L.R. 177* the High Court of Australia considered the scope of the offence of sedition under the Queensland Criminal Code and concluded that all the prosecution has to prove is that the words had been spoken publicly by the accused. The words alleged to be seditious speak for themselves.

1st Respondent's Position on Elements of the Offence

18. Counsel for Respondent Mr. Tunidau on the other hand takes the view that the intent of the person committing the act charged or *mens rea* is an essential element of the offence of Sedition which the Prosecution has to prove. He has cited Court of Appeal Judgment in ***State v Mua*** [1992] FJCA 23; AAU0016u.91s (27 November 1992) and ***Regina v Chief Metropolitan Stipendary Magistrate, Ex Parte Choudury*** [1990] 1 Q.B. 429 to support his position.

Discussion

19. Despite the forceful argument of Mr. Burney, this Court cannot accept the opinion that the seditious intention forms part of the *actus reus* of the offence and therefore the prosecution is not required to prove specific intent - it is sufficient to prove that the accused deliberately did an act and that the act was seditious.

20. Unlike in England where there is no Code offence of Sedition, the offence of Sedition in Fiji is codified and the elements of the offence are clearly and unambiguously defined in the Crimes Decree 2009.

21. Section 67 of the Crimes Decree defines the offence of Sedition as follows:

> *67. — (1) A person commits an indictable offence (which is triable summarily) if the person —*
>
> *(a) does or attempts to do, or makes any preparation to do, or conspires with any person to do any act with a seditious intention;*
>
> *(b) utters any seditious words;*
>
> *(c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication; or*
>
> *(d) imports any seditious publication, unless he has no reason to believe that it is seditious.*

22. Section 66 defines seditious intention in following terms:

> *66. — (1) A "seditious intention" is an intention —*
>
> *(i) to bring into hatred or contempt or to excite disaffection against the Government of Fiji as by law established; or*

(ii) to excite the inhabitants of Fiji to attempt to procure the alteration, otherwise than by lawful means, of any matter in Fiji as by law established; or

(iii) to bring into hatred or contempt or to excite disaffection against the administration of justice in Fiji; or

(iv) to raise discontent or disaffection amongst the inhabitants of Fiji; or

(v) to promote feelings of ill-will and hostility between different classes of the population of Fiji.

But an act, speech or publication is not seditious by reason only that it intends—

(a) to show that the Government of Fiji has been misled or mistaken in any of its measures; or

(b) to point out errors or defects in the government or Constitution of Fiji as by law established or in legislation or in the administration of justice with a view to the remedying of such errors or defects; or

(c) to persuade the inhabitants of Fiji to attempt to procure by lawful means the alteration of any matter in Fiji as by law established; or

(d) to point out, with a view to their removal, any matters which are producing or having a tendency to produce feelings of ill-will and enmity between different classes of the population of Fiji

23. It should be noted that definitions of sedition and seditious intention found in Section 66 and 65 respectively of the repealed Penal Code have been reproduced verbatim in Sections 67 and 66 of the Crimes Decree 2009 with the deletion of the phrase *'the person of Her majesty, Her heirs or successors or'*. Therefore, cases decided under the repealed Penal Code are relevant to resolve the issue in hand.

24. In ***State v Mua*** [1992] FJCA 23; AAU0016u.91s (27 November 1992) which was decided under the repealed Penal Code, the Court of Appeal observed:

> *"Basic rule of interpretation of a statute is that the Courts must construe plain words in their natural and ordinary sense. It is only if that is not possible that the Court should move on to consider any other basis for interpretation. That rule applies in England and Fiji".*

25. The Crimes Decree represents a complete and comprehensive statement of the law of sedition and must be interpreted in its own terms free from any glosses or interpolations derived from any expositions however authoritative of the law of other jurisdictions. Although no provision of the Crimes Decree prevents this Court from relying on any authority or judgment of any comparable foreign jurisdiction, in the aid of any matter of interpretation arising in the context of any offence prescribed by the Crimes Decree (See: Section 5 of the Crimes Decree), I do not see any reason why this Court should look at authorities or judgments of foreign jurisdictions when the elements of Sedition are clearly defined in the Crimes Decree.

26. The Privy Council in ***Wallace Johnson -v- The King*** *(supra)* succinctly pointed out the same view in response to the submission by Counsel for the appellant relying on a number of English and Scottish authorities including R v Burns, at pp.239 -240:

> *"Their Lordships throw no doubt upon the authority of these decisions, and if this was a case arising in this country, they would feel it their duty to examine the decisions in order to test the submissions on behalf of the appellant. The present case, however, arose in the Gold Coast Colony, and the law applicable is contained in the Criminal Code of the Colony. It was contended that the intention of the Code was to reproduce the law of sedition as expounded in the cases to which their Lordships' attention was called. Undoubtedly the language of the section under which the appellant was charged lends some colour to this suggestion. There is a close correspondence at some points between the terms of the section in the Code and the statement of the English law on sedition by Stephen J. in the Digest of Criminal Law, 7th ed., arts. 123-126, quoted with approval by Cave J. in his summing up on Reg. v Burns and others. The fact remains, however, that it is in the Criminal Code of the Gold Coast Colony, and not in English or Scottish cases, that the law of sedition for the Colony is to be found. The Code was no doubt designed to suit the circumstances of the people of the Colony. The elaborate structure of s. 330 suggests that it was intended to contain, as far as possible, full and statement of the law of sedition in the Colony. It must therefore be construed in its application to the facts of this case free from any glosses or interpolations derived from any expositions, however authoritative, of the law of England or of Scotland."*

27. I set out the above extract at length because I feel that similar approach should be taken by the Courts in Fiji when dealing with offences created by statutes, such as the one with which I am dealing here.

28. Section 5 (2) of the Crime Decree states:

> *"Expressions used in this Decree shall be presumed to be used with the meaning attaching to them in the criminal law as applied in jurisdictions based upon the laws of England, and shall be construed in accordance with such meanings –*
>
> *(a) so far as is consistent with their context; and*
>
> *(b) except as is expressly provided in this Decree".*

29. The purpose of this Section is to describe the principles of interpretation and construction of expressions in the Code. It is not authority for the proposition that the scope and extent of the offences themselves must be presumed to be the same as in English Criminal Law [see: ***State v Mua (supra)***]. The words in sections 67 and 66 are, in my opinion, clear and unambiguous and I cannot accept that these Sections should be interpreted in the light of English authorities.

30. I do not feel there is any difficulty with the words *"A person commits an indictable offence (which is triable summarily) if the person does or attempts to do, or makes any preparation to do, or conspires with any person to* ***do any act with a seditious intention****";* used in Section 67(1)(a) of the Crimes Decree. (emphasis added) Mr.

Burney also seems to have agreed with this view when he says in paragraph 4.13 of his submission that *"On the face of it, Section 66(2)? Crimes Act does concern the intention with which an act, etc. was done".*

31. Seditious intention is defined in Section 66 (1) (i) to (iv) of the Crimes Decree. It is significant that the statutory definition of "seditious intention" provides express exceptions at (a) to (d) of Section 66 (1) of the Crimes Decree 2009. Mr. Burney argues that by the phrase *"But an act, speech or publication is not seditious by reason only that it intends....."* the statute looks to the objective intent of the act, speech or publication rather than the subjective intent of the actor, speaker or publisher. I am unable to agree with this contention.

32. In ***Mua*** *(supra)* Fiji Court of Appeal observed:

> *"Before a Court can convict, it must first look to the intent of the person committing the act charged. If that amounts to one or more of the intentions in section 65(1)(i)-(v) the Court must then consider if paragraphs (a)-(d) may apply".*

33. Mr. Burney contends that the Court of Appeal was concerned only to determine the narrow point whether incitement to violence is an ingredient of the offence and any observations on the wider *mens rea* of the offence are strictly obiter.

34. I do not dispute the fact that the Court of Appeal did not expressly consider the *mens rea* of the statutory offence of Sedition and was only concerned to determine whether incitement to violence is an element of the offence. However, the judicial pronouncement of the Court of Appeal, in my opinion, has a great weight and reflects the correct position of the law as it stands in Fiji.

35. Section 66 preserves in the current law of sedition the presumption that a man intends the natural consequences of his own acts. Section 66(2) states:

> *"In determining whether the intention with which any act was done, any words were spoken, or any document was published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself"*

36. Under English common law, at a period when an accused could not give evidence in his own defence and his intention to produce a particular result by his act, where this was an ingredient of the offence, intention to produce a particular result of his acts was ascertained by applying this presumption. This presumption survived well into the twentieth century only to be fully removed from English criminal law by Section 8 of the Criminal Justice Act 1967.

37. This presumption which was of general application to offences in which the intention of the accused to produce a particular proscribed result formed an essential element in the *mens rea.* This presumption is part of criminal law relating to Sedition in Fiji despite its removal from English Law in 1967. Existence of this presumption in the Crimes Decree further reinforces the position that **specific seditious intention on the part of the accused is an essential element of the offence of Sedition in Fiji. Therefore, the Prosecution must prove the seditious intention beyond reasonable doubt.**

38. However, I approve the formulation of Mr. Burney that if the assessors, and ultimately the trial judge, find that an act done by the accused, looked at objectively, had the tendency to produce the effect that it was the policy of the law to prevent, for example to excite disaffection against the government of Fiji, then the application of the presumption is sufficient to convert this objective tendency into the actual intention of the accused.

39. I do agree with the observation made by Madigan J. in his summing up in ***State v Pita Ragolea Driti*** Criminal Case No. 5 of 2012 (Summing Up dated 26 November 2013), when he stated: *"It is the intention revealed by the publication that may lead to it being held to be blasphemous".*

40. Having said that it is extremely important as a matter of policy and also from case management perspective to identify the correct test to be applied in Fiji in rebutting this presumption. In casting a proper test to be applied in Fiji, a

consideration of the dissenting judgment of Lord Diplock in ***Lemon*** (supra) is of great help to understand the rationale behind the tests applied in England. *(Although disagreed, Lord Scarman also acknowledged that the view of the minority that specific intent must be proved has great persuasive force)*

41. In England, passing of the Criminal Evidence Act 1883 enabled the accused to give direct evidence in his own defence and of his own intention. Although this Act enabled the accused to give direct evidence of his own intention and thus added to the available material on which the jury's finding as to the accused's intention could be based, the presumption that a man intends the natural consequences of his own acts survived as a true presumption at least until the decision of this House in *Woolmington v Director of Public Prosecutionss* [1935] A.C.462,H.L.(E), that is to say, it was an inference that the jury was bound to draw unless the accused overcame the evidential burden of proving facts of a kind regarded by the law as being sufficient to rebut it.

42. There were two schools of thought among the judges in England as to how the presumption could be rebutted. The stricter school applied what has come to be known as the 'objective test'. It took the view that if the result proscribed were foreseeable by a reasonable man as being a likely consequence of his act, the presumption that the accused intended that result could only be rebutted by proof that he was insane or, in charges of murder brought after the passing of the Homicide Act 1957, that he suffered from some abnormality of mind. The onus of proving insanity or abnormality of mind lay on the accused.

43. The milder school applied the 'subjective test'. It treated the presumption, prior to *Woolmington (supra),* as having the effect of casting on the accused the evidential burden of proving that he had *not* intended the natural consequences of his act. After ***Woolmington*** *(supra)* the evidential burden cast on the accused was the lesser one of inducing doubt in the jury's mind as to whether such was his intention.

44. These competing views as to the nature and effect of the presumption and the authorities in support of each of them are cited in the judgments of the Court of Criminal Appeal and House of Lords in England. In the Court of Criminal Appeal the milder 'subjective test' prevailed; in the House of Lords the stricter 'objective test' triumphed.

45. In ***Director of Public Prosecution v Smith*** *[1961] A.C. 2190; 3All E.R.161 H.L.(E),* the House of Lords applied the stricter 'objective test'. Lord Diplock opines that if the law as expounded by in *Smith* had remained unchanged and had been treated as applicable to crimes which required a specific intention, blasphemous libel might well have reverted to what in effect would be an offence of strict liability. But Parliament stepped in to reinstate the milder view of the presumption by enacting s 8 of the Criminal Justice Act 1967:

> *'A court or jury, in determining whether a person has committed an offence,-(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.'*

46. This Section makes the 'subjective test' of the accused's intention applicable and the evidence of the accused as to what he intended or foresaw as the result of the publication or act becomes relevant and admissible to rebut the inference as to his intention that the jury might otherwise draw from what they themselves, as representing the reasonable man, considered would be the likely effect of what was published on those who saw and read it.

47. If the majority view in ***Lemon*** that the accused's intention was not a necessary element in the offence of blasphemous libel is accepted, this would effectively exclude that particular offence from the benefit of Parliament's general substitution of the subjective for the objective test in applying the presumption that a man intends the natural consequences of his acts; and blasphemous libel would revert to the exceptional category of crimes of strict liability. This would, in Lord Diplock's opinion, be a retrograde step which could not be justified by any considerations of public policy- the policy expounded in ***Reg. v. Ramsay and Foote*** (1883) 15 Cox C.C.231, 236] that the law visits not the honest errors, but the malice of mankind. A malicious and mischievous intention or what is equivalent to such an intention, in law, as well as moral, - a state of apathy and indifference to the interests of society, - is the broad boundary between right and wrong.

48. In Fiji, no legislative step similar to Section 8 of the Criminal Justice Act 1967 has been taken to reinstate the milder view of the presumption enabling the Courts to apply the 'subjective test'.

49. However, by recognizing in Sections 66 1 (a) to (d) certain exceptions that would negate seditious intention, **the Crimes Decree has opened up a space for an**

accused to adduce evidence to discharge the legal burden cast upon him in respect of those exceptions to rebut the presumption. [I used the term 'legal burden' to give effect to Section 60 (c) of the Crimes Decree which states: *"A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly.... (c) creates a presumption that the matter exists unless the contrary is proved"].*

50. **In other words, the 'subjective test' of the accused's intention is applicable in Fiji and the evidence of the accused as to what he intended or foresaw in respect of those exceptions as the result of his act or words becomes relevant and admissible to rebut the inference as to his intention that the assessors might otherwise draw from what they themselves, as representing the reasonable man, considered would be the likely effect of the act or words.**

51. With the acceptance of the 'subjective test' of the accused's intention in Fiji, it is pertinent, *(having utilized the permission afforded by Section 5 (2) of the Crimes Decree, (*namely, *"Expressions used in this Decree shall be presumed to be used with the meaning attaching to them in the criminal law as applied in jurisdictions based upon the laws of England, and shall be construed in accordance with such meanings"),* to declare the meaning ascribed in English criminal law to the expression "intention" of the accused in order to allay any fears that the assessors might exonerate a man whose intention to produce disaffection is illegal, but motive comes out in defence for such an intention may be one with which the assessors would strongly sympathise.

52. This fear is reflected in Lord Scarman's speech which Mr. Burney describes as a poetical articulation:

> *"It would be intolerable if by allowing an author or publisher to plead the excellence of his motives and the right of free speech he could evade the penalties of the law even though his words were blasphemous in the sense of constituting an outrage upon the religious feelings of his fellow citizens. This is no way forward for a successful plural society."*

53. Where intention to produce a particular result was a necessary element of an offence, no distinction was to be drawn in English law between the state of mind of one who did an act because he desired it to produce that particular result and the state of mind of one who, when he did the act, was aware that it was likely to produce that result but was prepared to take the risk that it might do so, in order to achieve some other purpose which provided his motive for doing what he did. It is now well settled after ***Reg. v Hyam*** [1975] A.C.55 that both states of mind constitute "intention" in the sense in which that expression is used in the definition of a crime whether at common law or in a statute.

54. For example, a person charged with publication of a seditious article might say in his defence that his intention was not to excite the inhabitants of Fiji to attempt to procure the alteration of the government by illegal means but to persuade the electorate to change the government by lawful means -at a general election. In deciding the crucial point of seditious intention, accused's motive is immaterial.

The real question is whether, by setting up the defence, his alleged seditious intention is satisfactorily negated in the light of exceptions provided in Section 66 or justified within the constitutional framework.

55. When a defence of this nature has been set up, free, fair and liberal interpretation of the offence advocated by Fitzgerald J in ***R v Sullivan*** (1886) 11 Cox 44 and by the Fiji Court of Appeal in ***Mua*** (supra) comes into play. In deciding whether or not an alleged publication or act is seditious, the courts, must have regard to the exceptions in Section 66 and various rights / freedoms and the limits thereto articulated in the Constitution. If the act or words is justifiable and legitimate in a democratic polity, then the act or words cannot be seditious. Fiji Court of Appeal observed:

> *"However, we are compelled to observe that, whilst sedition is a widely drawn offence, the erosion of the freedom of expression is modified by the defences in paragraph (a) to (d) of section 65(1)(a)-(d). Before a Court can convict, it must first look to the intent of the person committing the act charged. If that amounts to one or more of the intentions in section 65(1)(i)-(v) the Court must then consider if paragraphs (a)-(d) may apply.*
>
> *The purpose of the offence is to prevent any unlawful attacks on the tranquillity of the State but it is not intended to prevent legitimate political comment. Deeply held political convictions frequently provoke strong emotions but there is authority to show that even strong or intemperate words or actions may not demonstrate a seditious intention if done with the purpose of expressing legitimate disagreement with the government of the day in terms of paragraphs*

(a)-(d). When determining that, the Courts should always be reluctant to extend any inroads on the protected constitutional freedoms. They should look at alleged seditious actions with a free, fair and liberal spirit. Those words were used by Fitzgerald J in directing the jury in R v. Sullivan (1868) 11 Cox 44 at 59 and he continued:

> *"You should recollect that to public political articles great latitude is given. Dealing as they do with public affairs of the day - such articles if written in a fair spirit, and bona fide, often result in the production of great public good.*
>
> *Therefore, I wish to remind you to deal with these publications in a spirit of freedom and not view them with an eye of narrow criticism...... I ask you to view them in a broad and bold spirit, and give them a liberal interpretation."*

...The Court should bear in mind that genuine political dissent is often the ground from which democracy grows and always be vigilant that a charge of sedition is not used simply as a means to suppress it. For that reason the Court should always consider whether paragraphs (a)-(d) apply in any charge of sedition.

56. That case ***(Mua)*** concerned political publications but the same approach applies to political actions and is the test to be used in the present case.

57. Seditious intention is comprehensively defined in Section 66 of the Crimes Decree by reference to what is considered seditious intention followed by four

scenarios not considered to be seditious. Thus, for example, pursuant to Section 66(1)(b) an act is not seditious *by reason only* that it intends to show that the Government of Fiji has been misled or mistaken in any of its measures. Mr. Burney argues that defining seditious intention in this way gives rise to three conceptual difficulties.

58. The Court of Appeal in ***Mua*** (supra) has treated the exceptions recognised in Sections 66 (1) (a) to (c) as statutory defences and has tended to apply a two 'stage approach'. Firstly, has the prosecution proved an act was done with a sedition intention? Secondly, is there evidence bringing the accused within one of the four 'defences'? This approach taken by the Court of Appeal in treating the exceptions as "defences" has given rise to one of the conceptual difficulties Mr. Burney is talking about.

59. The difficulty with this approach is that the first issue cannot be determined without reference to the second issue since it will only be in cases where the exceptions are found not to apply that a finding that an act was done with a seditious intention may be reached.

60. By taking a 'holistic approach' in defining the offence of Sedition, the court can overcome this difficulty. Sections 66 (1) (a) to (c) provide for 'exceptions', stating that an act, speech or publication is not seditious if it intends to achieve any of the objectives stated therein. Therefore, the whole of Section 66 must be read and applied to the evidence in order to answer the question whether an act or speech

was done with a seditious intention. The liberal approach of interpretation suggested by the Court of Appeal in ***Mua*** (supra) provides a solution to this problem.

61. According to Burney's submission, the second difficulty arising from the statutory definition of seditious intention and so called statutory defences is that it would frustrate the purpose of the statutory offence of Sedition – to prevent any unlawful attack on the tranquility of the State.

62. This difficulty will not arise if the liberal approach to interpretation suggested by ***Mua*** and ***Sullivan*** is adopted to determine whether the alleged act or words is seditious. However, it should be recognized that some acts or words cannot be justified under any circumstance. For example, a publisher of an article advocating a change of government through violence or terrorism will not be justified under any of the exceptions in the Section or under the Constitution. In the same way, if the words spoken promote ill-will and hostility between different classes of the population, it cannot be said that all it does is advocate change through lawful means because the limitations placed on freedom of expression prohibit such words.

63. Lord Diplock's following concluding remarks in ***Lemon*** (supra) worth mentioning here:

> *"My own feeling of outrage at the blasphemous material with which the instant appeal is concerned makes it seem to me improbable that if Mr Lemon had been*

permitted to give evidence of his intentions the jury would have been left in any doubt that whatever his motives in publishing them may have been he knew full well that the poem and accompanying drawing were likely to shock and arouse resentment among believing Christians and indeed many unbelievers. Nevertheless, Mr Lemon was entitled to his opportunity of sowing the seeds of doubt in the jury's mind.

64. A third difficulty according to Mr. Burney arising from the statutory definition of seditious intention and the so-called statutory defences concerns the question of what evidence, if any, an accused is required to adduce in order to discharge his evidential burden, if any?

65. In ***DPP v Afasio Mua and Others*** *Criminal Appeal No 27 of 1990* (unreported) Scott J approached the defences on the basis that the onus of establishing such exceptions lies on the defence on the balance of probabilities. Mr. Berney doubts whether this would be the correct approach today having regard to developments in the judicial approach to reverse-onus provisions in the context of the presumption of innocence.

66. The approach taken by Scott J, in my opinion, is not obnoxious to the spirit of the Crimes Decree and the notion of presumption of innocence. Generally, a burden of proof that a law imposes on a defendant is an evidential burden only, except in particular circumstances, or where an offence expressly provides otherwise. **In view of the presumption created by law in respect of seditious intention [Sec.66(2)], it is obvious that a legal burden is cast on the defendant to rebut**

the presumption and prove that he is coming under one of the exceptions.

67. **A legal burden requires the defendant to establish the exception or defence on the balance of probabilities (Sec. 61). Once this is done, the prosecution must refute the exception or defence beyond reasonable doubt. Prosecution bears a legal burden of disproving any matter in relation to which the defendant has discharged a legal burden of proof imposed on the defendant.** Once the defendant has met the burden, the prosecution must refute the exception and prove all elements of the offence beyond reasonable doubt.

68. While framing a provision as a defence, rather than as an exception, does not of itself alter evidential burdens of proof, it may have procedural disadvantages for a defendant, in that a defendant must wait until the defence case is called before being able to lead evidence to justify his or her conduct. However, in a case of Sedition, Courts should take a holistic approach whereby the whole of Section 66 must be read and applied to the evidence in order to answer the question whether an act was done with a seditious intention.

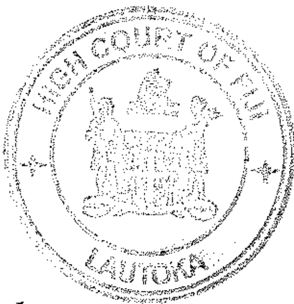
Conclusion

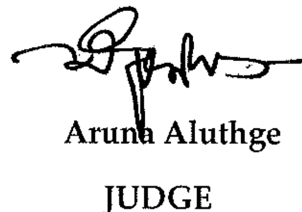
69. In Fiji, specific seditious intention or *mens rea* forms part of necessary element of the offence of Sedition and therefore the prosecution is required to prove specific intent beyond reasonable doubt.

70. The Crimes Decree has opened up a space for an accused to adduce evidence to discharge the legal burden cast upon him in respect of exceptions to rebut the presumption.

71. The 'subjective test' of the accused's intention is applicable in Fiji and the evidence of the accused as to what he intended or foresaw in respect of those exceptions as the result of his act or words becomes relevant and admissible to rebut the inference as to his intention that the assessors might otherwise draw from what they themselves, as representing the reasonable man, considered would be the likely effect of the act or words.

72. A legal burden requires the defendant to establish the exception or defence on the balance of probabilities. Once this is done, the prosecution must refute the exception or defence beyond reasonable doubt. Prosecution bears a legal burden of disproving any matter in relation to which the defendant has discharged a legal burden of proof imposed on the defendant.





Aruna Aluthge

JUDGE

At Lautoka

27th February, 2017

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