

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 361 of 2016

STATE

v.

- 1. JOSAIWAQABACA**
- 2. ANARE RAVULA**
- 3. FRED WESLEY**
- 4. HANK ARTS**
- 5. FIJI TIMES LIMITED**

Counsel: Mr. L. Burney, Mr Y. Prasad for State
Mr Ravindra Singh A. for Accused 1
Mr D. Sharma for Accused 2
Mr F. Haniff for Accused 3
Mr F. Haniff for Accused 4
Mr F. Haniff for Accused 5

Hearing: 18th May 2017 and 28th June 2017

Ruling: 27th July 2017

RULING

Introduction

1. The first, second, third, fourth and fifth accused were first charged with one count of Inciting Communal Antagonism, contrary to Sections 65(2) (a) (i) and 53(1) of the Crimes Act. The Prosecution then filed amended information, introducing five separate counts of Sedition against each of the five accused on the 23rd of March 2017. According to the amended information, the prosecution has charged the first accused for one count of Sedition contrary to Section 67 (1) (a) of the Crimes Act, the second accused for one count

of Sedition contrary to Section 67(1) (c) read with Section 45 of the Crimes Act, the third accused for one count of Sedition contrary to Section 67(1) (c) read with Section 45 of the Crimes Act, the fourth accused for one count of Sedition, contrary to Section 67 (1) (c) of the Crimes Act and the fifth accused for one count of Sedition Contrary to Section 67 (1) (c) read with Section 51 of the Crimes Act. The particulars of offences are that:

Count 1
(First Accused only)

Statement of Offence

SEDITION: Contrary to section 67 (1) (a) of the Crimes Act 2009.

Particulars of Offence

JOSAIA WAQABACA between the 20th and 27th day of April 2016 at Suva in the Central Division did a seditious act, namely wrote and submitted an article for publication in the Nai Lalakai newspaper and in the said article made a statement namely, "Ko ira na Musulomani era sega ni taukei kei Viti, sai ira nai lawalawa ogo era a curu botea na vanua eso ka dua vei ira ko Bangladesh mai Idia, kara vei vakamatei kina, kucuvi na nodra yalewa, ra vakararawataki na gone me yacova sara nira sa lewa ka sa nodra tu e daidai" (translated as "Muslims are not the indigenous of this country. These are people that have invaded other nations for example, Bangladesh in India, where they killed, raped and abused their women and children. Today they have gone to the extent of having a part in the running of the country") with a seditious intention to promote feelings of ill-will and hostility between different classes of the population of Fiji.

Count 2
(Second Accused only)

Statement of Offence

SEDITION: Contrary to section 67 (1) (c) read with section 45 of the Crimes Act 2009.

Particulars of Offence

ANARE RAVULA on or about the 27th day of April 2016 at Suva in the Central Division in his capacity as editor of Nai Lalakai newspaper did aid and abet Hank Arts to publish an article in the Nai Lalakai newspaper which contained a statement, namely "Ko ira na Musulomani era sega ni taukei kei Viti, sai ira nai lawalawa ogo era a curu botea na vanua eso ka dua vei ira ko Bangladesh mai Idia, kara vei vakamatei kina, kucuvi na nodra yalewa, ra vakararawataki na gone me yacova sara nira sa lewa ka sa nodra tu e daidai" (translated as "Muslims are not the indigenous of this country. These are people that have invaded

other nations for example, Bangladesh in India, where they killed, raped and abused their women and children. Today they have gone to the extent of having a part in the running of the country”) which was a seditious publication.

Count 3
(Third Accused only)

Statement of Offence

SEDITION: Contrary to section 67 (1) (c) read with section 45 of the Crimes Act 2009.

Particulars of Offence

FRED WESLEY on or about the 27th day of April 2016 at Suva in the Central Division in his capacity as editor-in-chief of *Nai Lalakai* newspaper did aid and abet Hank Arts to publish an article in the *Nai Lalakai* newspaper which contained a statement, namely “Ko ira na Musulomani era sega ni taukei kei Viti, sai ira nai lawalawa ogo era a curu botea na vanua eso ka dua vei ira ko Bangladesh mai Idia, kara vei vakamatei kina, kucuvi na nodra yalewa, ra vakararawataki na gone me yacova sara nira sa lewa ka sa nodra tu e daidai” (translated as “Muslims are not the indigenous of this country. These are people that have invaded other nations for example, Bangladesh in India, where they killed, raped and abused their women and children. Today they have gone to the extent of having a part in the running of the country”) which was a seditious publication.

Count 4
(Fourth Accused only)

Statement of Offence

SEDITION: Contrary to section 67 (1) (c) of the Crimes Act 2009.

Particulars of Offence

HANK ARTS on the 27th day of April 2016 at Suva in the Central Division in his capacity as the publisher of *Nai Lalakai* newspaper published an article in the *Nai Lalakai* newspaper which contained a statement, namely “Ko ira na Musulomani era sega ni taukei kei Viti, sai ira nai lawalawa ogo era a curu botea na vanua eso ka dua vei ira ko Bangladesh mai Idia, kara vei vakamatei kina, kucuvi na nodra yalewa, ra vakararawataki na gone me yacova sara nira sa lewa ka sa nodra tu e daidai” (translated as “Muslims are not the indigenous of this country. These are people that have invaded other nations for example, Bangladesh in India, where they killed, raped and abused their women and children. Today they have gone to the extent of having a part in the running of the country”) which was a seditious publication.

Count 5
(Fifth Accused only)

Statement of Offence

SEDITION: *Contrary to section 67 (1) (c) read with section 51 of the Crimes Act 2009.*

Particulars of Offence

FIJI TIMES LIMITED, a company having its registered office at 177 Victoria Parade, Suva, on the 27th day of April 2016 at Suva in the Central Division printed the *Nai Lalakai* newspaper which contained an article which contained a statement, namely “*Ko ira na Musulomani era sega ni taukei kei Viti, sai ira nai lawalawa ogo era a curu botea na vanua eso ka dua vei ira ko Bangladesh mai Idia, kara vei vakamatei kina, kucuvi na nodra yalewa, ra vakararawataki na gone me yacova sara nira sa lewa ka sa nodra tu e daidai*” (translated as “*Muslims are not the indigenous of this country. These are people that have invaded other nations for example, Bangladesh in India, where they killed, raped and abused their women and children. Today they have gone to the extent of having a part in the running of the country*”) which was a seditious publication.

2. The learned counsel for the second, third, fourth and fifth accused raised objections against the amended information, on the ground that the amended information has not provided adequate information and particulars as required under Sections 58 and 61 of the Criminal Procedure Act. The learned counsel for the first accused informed the court that he has no objection in respect of the first count in the amended information.
3. Having considered the objections raised by the defence, I directed the parties to file their respective written submissions, which they filed as per the directions. Subsequent to filing of the respective written submissions, the matter was proceeded for hearing on 18th of May 2017, where the counsel for the defence and the prosecution made their respective oral submissions and arguments. I then adjourned the matter for my ruling till 29th of June 2017. Meanwhile, the court on its own motion called this matter on the 28th of June 2016 and invited the counsel for the prosecution and the defence to file further submissions in respect of the application of Sections 23 of the Crimes Act and Part 8 of the Crimes Act. All the parties filed their respective further submissions as requested. Having carefully considered the respective written and oral submissions of the parties, I now proceed to pronounce my ruling as follows.

Background

4. According to the second count, the prosecution alleges that the second accused in his capacity as Editor of Nai Lalakai newspaper has aided and abetted the fourth accused to publish an article which contained seditious statement in the said Nai Lalakai newspaper on the 27th of April 2016.
5. In respect of the third accused, the prosecution alleges that he in his capacity as Editor-in-Chief of Nai Lalakai newspaper has aided and abetted the fourth accused to publish an article, which contained seditious statement in the said Nai Lalakai newspaper on the 27th of April 2016.
6. The prosecution alleges that the fourth accused in his capacity as the Publisher, has published an article which contained seditious statement in the said Nai Lalakai newspaper on the 27th of April 2016.
7. The charge against the fifth accused is founded on the allegation that the fifth accused has printed the Nai Lalakai newspaper containing an article with seditious statement on the 27th of April 2016.
8. The learned counsel for the second accused submits that the prosecution has not provided the particulars of how the second accused has aided or abetted the fourth accused in the information, which is inconsistent to the requirement as stipulated under Section 58 and 61 of the Criminal Procedure Act. The learned counsel further submits that the prosecution has not provided the particular seditious intention, that is the *mens rea* of this alleged offence in the information. These defects in the information prevent the second accused to properly comprehend the nature of the charge that he is charged with, making it difficult for him to form a considered defence against the charge.
9. The learned counsel for the third, fourth and fifth accused also raised the same contention that the relevant seditious intention as stipulated under Section 66 (1) has not been provided in the particulars of offence. In respect of the third accused, the learned counsel

further submits that the prosecution has not provided the particulars of how the third accused has aided or abetted the fourth accused.

10. The fourth and fifth accused contend that the prosecution has not provided the particulars of how the fourth and fifth accused have respectively published and printed the said Nai Lalakai newspaper containing an article with the seditious comment. In respect of the fifth accused, the learned counsel further submits that the prosecution has not provided the particulars how the physical element and the fault element of the offence of Sedition is attributed to the fifth accused pursuant to Part 8 of the Crimes Act.

Laws relating to Charges/ Information

11. Having briefly considered the main grounds of the objections raised by the defence, I now draw my attention to the laws pertaining to charges or information.
12. Sections 58 and 61 of the Criminal Procedure Act stipulate what should contain in the charge or information. It states that:
- “Every charge or information shall contain—*
- i) A statement of the specific offence or offences with which the accused person is charged; and*
 - ii) Such particulars as are necessary for giving reasonable information as to the nature of the offence charged”.*
13. Section 61 of Criminal Procedure Act states that:
- i) A count of a charge or information shall commence with a statement of the offence charged, and this shall be called the statement of offence.*
 - ii) Each statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence.*

iii) *The charge shall contain a reference to the section of the law creating the offence.*

iv) *After the statement of the offence, particulars of the offence shall be set out in ordinary language, and the use of technical terms shall not be necessary.*

14. Accordingly, the statement of offence and the particulars of offence are the two main components in instituting an action. The statement of offence describes the offence and the particulars of offence explain the nature of the charge. It is not required to use the language of legal parlance in the statement of offence and particulars of offence. It should be in ordinary language, avoiding as far as possible the use of technical terms. Moreover, it is not necessary to state all the essential elements of the offence in the statement of offence.

15. The Fiji Court of Appeal in **Shekar & Shankar v. State (Criminal Appeal No AAU0056 of 2004)** discussed the purpose of a charge, where it held that:

“The purpose of the charge is to ensure that the accused person knows the offence with which he is being charged. Whilst the particulars should be as informative as it reasonably practicable, it is not necessary slavishly to follow the section in the Act”.

16. In **State v. Singh (Criminal Appeal No AAU0097 of 2005S)** the Fiji Court of Appeal expounded the purpose of the particulars of offence, where it observed that:

“The purpose of the particulars of offence is to indicate to the person accused of the offence the nature of the case the state intends to present. It does not need to set out the whole evidence and it is sufficient if it indicates how the case will be presented. What is important is the evidence the prosecution adduces”.

17. In view of Sections 58 and 61 and the above judicial precedents, the statement of the offence and the particulars of the offence must constitute what the prosecution alleges against the accused. It is noteworthy to understand the distinction between what the prosecution alleges against the accused with the evidential scope of the legal burden born by the prosecution in proving the charges.
18. The objections of the defence are mainly founded on the lack of particulars provided in the particulars of offence. The defence contends that the prosecution has failed to provide following information in the particulars of the offences, that:
- i) How the second and third accused have aided or abetted the fourth accused in publishing this alleged article with seditious comments,
 - ii) The specific seditious intention of the second, third, fourth and fifth accused as stipulated under Section 66 (1) of the Crimes Act,
 - iii) How the fourth accused has published this alleged article with seditious comments,
 - iv) How the fifth accused has printed this alleged article with seditious comments,
 - v) Particulars of how the physical element and fault element of the fifth count attribute criminal responsibility to the fifth accused.

Seditious Intention

19. Having discussed the laws pertaining to charges/information, I now turn onto discuss whether the seditious intention is one of the essential elements of the offence of Sedition pursuant to Section 67 (1) (c) of the Crimes Act.
20. Section 66 (1) (i) - (v) of the Crimes Act has stipulated the definition of the seditious intention, where it states that:
- I) *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.*

21. Section 66 (1) (a) - (d) stipulates that an act, speech, or publication is not seditious if such act, speech or publication is carried out with certain intentions. Section 66 (1) (a) - (d) states that:

“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.*

22. Section 67 (1) of the Crimes Act states that:

“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.*
23. The prosecution has provided in the first count, the nature of the specific seditious intention that they alleges against the first accused. The first accused is charged under Section 67 (1) (a) of the Crimes Act. Section 67 (1) (a) has specifically stated that the act must be done with a seditious intention. However, the learned counsel for the prosecution argues that the offence of sedition under Section 67 (1) (c) does not constitute any specific seditious intention. The intention is subsumed within the physical elements of the offence.
24. In view of the submissions made by the learned counsel for the prosecution, it appears that the position of the prosecution is that, since the offence as described under Section 67 (1) (c) has not specifically stated about the seditious intention, the seditious intention is not an element for the offence of sedition. The defence argues otherwise and submits that Section 67 must be read together with Section 66 (1) of the Crimes Act.
25. According to Section 13 of the Crimes Act, an offence consists of physical and fault elements, unless the law that creates the offence provides that there is no fault element for that particular offence. Section 13 (3) has further stated that the law creating the offence can provide different fault elements for the physical elements. Section 13 of the Crimes Act states that:
- i) *An offence consists of physical elements and fault elements.*
 - ii) *However, the law that creates the offence may provide that there is no fault element for one or more physical elements.*
 - iii) *The law that creates the offence may provide different fault elements for different physical elements.*

26. The law as referred under Section 13 has been defined under Section 4 of the Crimes Act as the laws of Fiji including the Crimes Act.
27. Section 23 of the Crimes Act deals with the offences that do not specify fault elements, where it states that:
- i) *If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.*
 - ii) *If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element. If the law that creates the offence does not specifically provide a fault element for the physical element that consists only of conduct, the intention is the fault element for that physical element.*
28. In view of Section 13 and 23 of the Crimes Act, the offence of sedition as described under Section 67 (1) (b), (c) and (d) encompasses the physical element and the fault element. The specific fault elements of the offence of sedition have been stipulated under Section 66 (1) of the Crimes Act.
29. The Fiji Court of Appeal in **State v. Mua [1992] FJCA 23; AAU0016u.91s (27 November 1992)** held that:
- “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”.*
30. In **State v. Mua (supra)** the Fiji Court of Appeal confirmed that the seditious intention as stipulated under Section 65 (the corresponding section in the Crimes Act is Section 66) is an essential element of the offence of Sedition.

31. Justice Shameem in State v. Riogi [2001] FJHC 61; Haa0060j.2001s (20 August 2001) held that:

“However in Fiji, where sedition is defined by statute, the prosecution need not prove either incitement to violence, or the provoking of disorder or violence. In Fiji, the ingredients of the offence are that 1) the accused, 2) did an act, 3) with 4) seditious intent. The statutory defences available are as listed in section 65(1) (a), (b), (c) and (d) of the Penal Code. The crux of the defences, is that persons who act in order to lawfully effect change in the government or the Constitution, are not guilty of Sedition”.

32. Justice Aluthge in State v. Niudamu [2017] FJHC 145; HAM30.2017 (27 February 2017) held that:

“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”.

33. In view of the above discussed provisions of the Crimes Act and the judicial precedents, I find that the specific sedition intention is an essential element of the offence of Sedition as defined under Section 67 (1) (c).

Aiding and Abetting

34. The second and third accused contend that the prosecution has not provided the particulars of how the second and third accused have aided or abetted the fourth accused to commit

the offence of sedition as charged. They further submit that the prosecution has only stated in the information that in their respective capacities as the editor and editor-in-chief of the Nai Lalakai newspaper, they have aided and abetted the fourth accused. The position of the editor or the editor-in-chief itself is not enough to allege that they have aided and abetted the fourth accused.

35. The learned counsel for the prosecution submits that it is not necessary to provide such particulars as the second and third accused know about their respective roles in the publication of this newspaper.
36. Section 45 of the Crimes Act states that:
- I) *A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.*
 - II) *for the person to be guilty —*
 - a. *the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and*
 - b. *the offence must have been committed by the other person.*
 - III. *Subject to sub-section (6), for the person to be guilty, the person must have intended that —*
 - c. *his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or*
 - d. *his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.*
37. According to Section 45, a certain conduct, either an act or an omission of an act, of the accused must have aided or abetted the commission of the offence and that offence must have been committed by the other person. This constitutes the physical part of aiding and abetting.

38. The *mens rea*, that is required to aid and abet under Section 45 of the Crimes Act is the intention to aid and abet the commission of the offence.
39. Sir Robert Lowry CJ in James Charles Maxwell v. DPP for Northern Ireland (68 Cr. App R 128) has expounded the term of aiding and abetting, where Lowry CJ held that:
- "I shall, like authors of Smith and Hogan, Criminal Law 9 3rd ed 1973), Cap, 8, use the term abettor and counsellor to cover aiding and abetting on the one hand and counseling and procuring on the other. An abettor is one who is present assisting or encouraging the principal at the time of the offence, while a counsellor is one who before the commission of the crime conspires to commit it, advises its commission or knowingly gives assistance to one or more of the principals. It is enough to prove an accused to be an abettor or a counsellor without showing which. Abetting and counseling are by origin common law offenses and a guilty mind is necessary ingredient. The Crown must prove that an accused participated before or during the commission of the crime, assisted the principal and intended to assist him. The mens rea required goes to intent only and does not depend on desire or motive".*
40. While outlining the scope of the physical and fault elements of aiding and abetting, Goundar JA in Areibulu v. State [2014] FJCA 144; AAU102.2013 (15 September 2014) held that:

"In order to prove an aiding and abetting, the prosecution must prove firstly an intent to encourage, and secondly an act or omission which amounted to a positive act of assistance (Reg v Coney (1882) 8 QBD 534). In order to prove both limbs, it must be shown or inferred from the circumstances that the offender knew that the offence was going to be committed, or was being committed (Iliaseri Saqasaqa v The State Criminal Appeal No. HAA098 of

2004S). *Whether the appellant knew an offence was being committed was a question of fact for the trial judge. Knowledge is a matter of inference*".

41. Accordingly, the particulars of the alleged conduct of aiding or abetting is essentially important in order to comprehend what the prosecution alleges against the accused.
42. As discussed above, the required *mens rea* is the intention to aid or abet the commission of the offence. Hence, any specific seditious intention of the aider or the abetter does not necessarily constitute the required intention under Section 45 of the Crimes Act. However, the particulars of the seditious intention of the principal offender is essentially important as the knowledge of the aider or the abetter about the offence for which he aided or abetted is materially relevant in order to properly understand the allegation against the aider or the abetter.

Particulars of Seditious Act in respect of fourth and fifth accused

43. The learned counsel for the fourth and fifth accused argues that the prosecution must provide the particulars of how the fourth and fifth accused respectively published and printed the newspaper containing this alleged article with seditious comments. I do not find any merit in this proposition as it is sufficient to provide the nature of the seditious act in the particulars of the offence. In respect of the fourth accused, the alleged seditious act is the publication of the newspaper. Whereas the alleged seditious act of the fifth accused is the printing of the said newspaper containing an article with seditious comments.

Corporate Criminal Responsibility

44. It is prudent for the prosecution to provide the particulars of how the physical element and the fault element of the offence of Sedition attributed to the fifth accused, which undoubtedly assist the fifth accused to properly comprehend the allegation leveled against them in the fifth count. In doing that, I find that the providing of relevant statutory provisions in the statement of offence would adequately serve the said requirement.


45. Having discussed above reasons, I draw my attention to the observation made by Donavan J in **R v McVitie (1960) 44 Cr. Ap. R 201**, where it was held that:

“A bad indictment would be one disclosing no offence known to the law, for example, where it was laid under a statute which had been repealed and not re-enacted. In the present case the indictment described the offence with complete accuracy in the "Statement of Offence". Only the particulars, which merely elaborate the "Statement of Offence", were incomplete”.

46. As observed by Donavan J in **McVitie (supra)**, I do not find the amended information is bad in law. The offences as described in the information are known to the law. They have been described in the information with the relevant provisions of the law. However, it is my opinion that the particulars of the offences in respect of the second, third, fourth and fifth counts are incomplete. Such incompleteness undoubtedly prevents the accused to properly comprehend what the prosecution alleges against them. Therefore, I order the prosecution to provide the following particulars of the information, that:

- i) The specific seditious intention of the fourth and fifth accused,
- ii) The particulars of how the second and third accused aided and abetted the fourth accused in commission of the offence of Sedition as charged,
- iii) The relevant statutory provisions that the prosecution relies on in order to attribute the physical element and the fault element of the offence of Sedition as charged under Count five to the Fifth accused.




R.D.R.T. Rajasinghe
Judge

At Suva
27th July 2017

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