

IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an extradition application under the Extradition Act 2003.

STATE

Applicant

CASE NO: HAM. 111 of 2017

Vs.

KRISHNEEL PRAKASH
CHAUDARY

Respondent

Counsel : Ms. J. Prasad for the Respondent
Mr. G. O'Driscoll for the Applicant

Hearing on : 01st August 2017

Ruling on : 30th August 2017

JUDGMENT

1. The Learned Chief Magistrate has transferred this case under section 15 of the Extradition Act 2003 ("Extradition Act") on 19th June 2017. The said order entails that the Learned Chief Magistrate had made a determination that the above named respondent should be held for surrender.

2. The above determination has been made by the Learned Chief Magistrate pursuant to an extradition request made by the United States of America (“requesting country”).
3. According to the said request, a ‘Felony Complaint’ had been filed on 29th March 2016 against the respondent in the Superior Court of California, County of Sacramento, charging the respondent with nine counts of child molestation contrary to section 288(a) of the California Penal Code. Based on the said Felony Complaint the aforementioned court had issued an arrest warrant against the respondent.
4. In terms of section 18(1) of the Extradition Act, a Judge must make a final decision whether the person should be surrendered, if;
 - a) a magistrate has reported to a Judge that a person should be held for surrender; and
 - b) - the period during which an appeal may be lodged has ended and no appeal was lodged, or
 - on appeal, the court ordered that the person be held for surrender, or
 - 21 days has expired after the date of the order for determination for surrender by the magistrate.
5. Though section 18(1) of the Extradition Act refers to a ‘period during which an appeal may be lodged’, the Act does not provide a right of appeal against the decision of a magistrate. Section 17 of the Extradition Act provides for a revision to be filed within 15 days after the date of the order. In my view, the ‘appeal’ referred to in section 18 above cannot be an appeal under section 246 of the Criminal Procedure Act for the reason that the time within which an appeal under section 246 of the Criminal Procedure Act should be filed is 28 days. Considering the construction of section 18(1)(b) of the Extradition Act, the appealable period referred to in the said section 18(1)(b) should be less than 21 days. Therefore, in my view, the term ‘appeal’ in section 18(1)(b) of the Extradition Act should be construed as referring to the provisions for review provided under section 17 of the said Act.

6. However, when this matter was taken up for hearing, 42 days had expired after the date of the order for determination for surrender by the magistrate. No appeal or an application for review has been made against the said order.

7. Section 18(2) of the Extradition Act states thus;

A Judge may refuse to order that the person be surrendered if-

- (a) the requesting country has not given a specialty undertaking and-*
 - (i) the requesting country is not a country with which the Fiji Islands has a bilateral treaty containing a specialty undertaking; or*
 - (ii) the law of the requesting country does not contain a provision prohibiting prosecution for an offence other than the one for which the person is surrendered;*
or
- (b) the person is a citizen of the Fiji Islands;*
- (c) the offence for which surrender has been ordered is punishable by death in the requesting country but not in the Fiji Islands and the requesting country has not given sufficient undertaking that the penalty either will not be imposed or, if imposed, will not be carried out;*
- (d) a prosecution for the offence for which surrender has been ordered is pending against the person in the Fiji Islands;*
- (e) the offence for which surrender has been ordered was committed outside the territory of the requesting country and the law of the Fiji Islands does not provide for jurisdiction over an offence of that kind committed in similar circumstances outside its territory;*
- (f) the offence for which surrender has been ordered is regarded by the Fiji Islands as having been committed wholly or partly within the Fiji Islands;*
- (g) the person has been sentenced or would be liable to be tried or sentenced in the requesting country by an extraordinary or ad hoc court or tribunal;*
- (h) the person has been subjected in the requesting country to torture or cruel, inhuman or degrading treatment or punishment; or*
- (i) having regard to-*
 - (i) the national interest of the Fiji Islands, including its interests in effective international cooperation to combat crime; and*
 - (ii) the severity of the offence,*

the Judge is of the view that the person should not be surrendered.

Grounds of objection

8. The respondent has filed objections setting out 6 grounds against this application for surrender of the respondent. The said grounds are as follows;
 1. *The Respondent is charged with committing 'lewd or lascivious acts involving children, in violation of California Penal Code Section 288(a)' in the state of California in the United States of America. For the purposes of the extradition the charge has been likened to the local charge of sexual assault and defilement contrary to sections 210 and 215 of the Crimes Decree 2009 of Fiji respectively. However, the charges set out under the California Penal Code Section 288(a) do not afford the same defence as a charge under Section 215 of the Crimes Decree 2009 of Fiji.*
 2. *There appears to be no specialty undertaking given to ensure that the Respondent could not be charged with offences other than those mentioned in the extradition request leading to potentially more severe penalties than currently faced, such as a charge of statutory rape as exists under California Law.*
 3. *The Respondent has reason to believe that the prosecution may alter the charges against him once he is before the United States Sacramento Superior and Municipal Court which is contrary to the representations made on the application for extradition based on telephone discussions between his Fiji counsel and the Sacramento District Attorney in carriage of the matter in California, USA.*
 4. *The Respondent is a Fiji citizen and by reason of this has a reasonable and legitimate expectation that the Government of Fiji would take the necessary steps to protect the Respondent from any arbitrary exercise of power by a foreign government.*
 5. *The Respondent is a citizen of Fiji and international jurisprudence recognizes that no country should surrender its citizens lightly.*
 6. *Pursuant to the Treaty Article 2 would appear to exclude extradition in the event that the charge laid are found to be equivalent to Indecent Assault because the relevant sub-clause (6) clearly states that to be extradited for Indecent Assault the offence must be an indictable offence in the Country from which extradition is sought and in Fiji such charge is a summary offence only.*

Ground one

9. On this ground, the respondent does not take up the position that the offences he is charged with in the requesting country are not extradition offences. The argument is that the defence provided under section 215 of the Crimes Act 2009 of

Fiji ("Crimes Act") is not available under section 288(a) of the California Penal Code.

10. The issue highlighted in this ground is not a ground to refuse the surrender of the respondent in terms of section 18(2) of the Extradition Act. Moreover, as highlighted by the State, this ground does not also amount to a valid extradition objection under section 4 of the said Act. Therefore it is a futile exercise to determine whether or not the defence available under section 215 of the Crimes Act is available under the section 288(a) of the California Penal Code.

Grounds two and three

11. These grounds relates to 'specialty undertaking'. The Learned Counsel for the State agreed during the hearing of this application that no specialty undertaking has been given pertaining to this case. However, in terms of section 18(2)(a) of the Extradition Act, the fact that no specialty undertaking is given alone is not sufficient to refuse to make an order that the person be surrendered. It would be a ground to refuse to make such order if the requesting country has not given a specialty undertaking **and** the requesting country is not a country with which Fiji has a bilateral treaty containing a specialty undertaking.
12. United States of America is a country with which Fiji has a bilateral treaty and Article 7 of the said Treaty contains a specialty undertaking. Article 7 reads as follows;

"A person surrendered can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place, until he has been restored, or has had an opportunity of returning, to the territories of the High Contracting Party by whom he has been surrendered.

This stipulation does not apply to crimes or offences committed after the extradition."

13. Grounds two and three above are misconceived.

Grounds four and five

14. On these two grounds, the respondent submits that, because the respondent is a Fiji Citizen, there is a reasonable and a legitimate expectation that the Government of Fiji would take necessary steps to protect the respondent and no country should surrender its citizens lightly.
15. In the case of *State v Kinho Lo* [2015] FJHC 187; HAM199.2014S (16 March 2015), while dealing with a similar argument, His Lordship Justice Temo said this;

“While on its face Mr. O’Driscoll’s argument appear valid, Fiji’s obligation to protect its citizens against foreign governments only arises, if the citizen had not violated the foreign government’s domestic and other laws. In other words, Fiji citizens who violate other foreign government’s laws, must seek remedies available under that foreign government laws, while simultaneously seeking assistance from the Republic of Fiji. The Republic of Fiji is only obliged to assist its citizens within that foreign governments domestic laws, Fiji’s domestic laws and international laws. In this case, the applicant is doing exactly the above. Within its treaty obligation, the State of Fiji is surrendering its citizen to the United States of America, to face due process of law. Any relief sought by the respondent, must be obtained within the domestic laws of the United States of America.”

16. I too share the same sentiments expressed by His Lordship Justice Temo. For the same reasons given in the above *dictum* I hold that grounds four and five are devoid of merit. These grounds do not raise a valid extradition objection.

Ground six

17. On this ground the respondent submits that the respondent should not be extradited in view of the provisions in Article 2 of the relevant Treaty for the reason that the offence of ‘indecent assault’ is not an indictable offence in Fiji.
18. It appears that the respondent is in fact relying on Article 3 of the relevant Treaty

which deals with offences for which extradition shall be reciprocally granted and not Article 2. Article 3(6) of the relevant Treaty states thus;

“Indecent assault if such crime or offence be indictable in the place where the accused or convicted person is apprehended.”

19. The respondent points out that the offence of indecent assault is a summary offence under the Crimes Act.
20. The offence of ‘indecent assault’ under the now repealed Penal Code of Fiji is a felony. The Crimes Act introduced the offence of sexual assault which is an indictable offence triable summarily. It is pertinent to note that the definition provided under section 210(1)(a) for the offence of sexual assault is identical with the definition of the offence of indecent assault under section 212(1)(a). The point I wish to make here is that, it would not be proper to solely rely on the short title of the offence in deciding whether a particular offence is an extradition offence or not.
21. On the other hand, in my view, the use of the term “such crime or offence” in Article 3(6) of the relevant Treaty denotes that the provisions in the said sub-clause of Article 3 refers to a crime or offence in the nature of indecent assault and not necessarily the offence with the short title ‘indecent assault’.
22. Moreover, it is necessary to refer to section 3 of the Extradition Act in order to determine whether a particular offence is an extradition offence. Section 3 of the Extradition Act provides thus;

3.- (1) *An offence is an extradition offence if-*

(a) it is an offence against a law of the requesting country for which the maximum penalty is death or imprisonment, or other deprivation of liberty, for a period of not less than 12 months; and

(b) the conduct that constitutes the offence, if committed in the Fiji Islands, would constitute an offence in the Fiji Islands for which the maximum penalty is life

imprisonment or other term of imprisonment or deprivation of liberty, for a period of not less than 12 months.

(2) In determining whether conduct constitutes an offence, regard may be had to only some of the acts or omissions that make up the conduct.

(3) In determining the maximum penalty for an offence for which no statutory penalty is imposed, regard must be had to the level of penalty that can be imposed by any court in the requesting country for the offence.

(4) An offence may be an extradition offence although -

(a) it is an offence against a law of the requesting country relating to taxation, customs duties or other revenue matters or relating to foreign exchange control; and

(b) the Fiji Islands does not impose a duty, tax, impost or similar control.

23. In making his determination under section 15 of the Extradition Act the Learned Chief Magistrate has held that the closest equivalent offence to the offence under section 288(a) of the California Penal Code is the offence of sexual assault under section 210(1)(a) of the Crimes Act. The aforementioned decision of the Learned Chief Magistrate has not been challenged by way of a revision or an appeal.

24. The offence of sexual assault under section 210(1)(a) carries a maximum penalty of 10 years imprisonment. The penalty for the offence under section 288(a) of the California Penal Code is an imprisonment term for 3, 6 or 8 years. Therefore, the offences the respondent is charged with are extradition offences in terms of section 3 of the Extradition Act.

25. Given the above, I find that ground six is devoid of merit.

Conclusion

26. Considering all material before me, I am satisfied that no valid extradition objection is established in this case in terms of section 4 of the Extradition Act. Further, having gone through the provisions of section 18(2) of the Extradition Act, I am satisfied that there is no basis to refuse to make an order for the

surrender of the respondent to the requesting country.

27. In the circumstances, I order that the respondent be surrendered to the United States of America as per the application made in that regard by the said requesting country. A surrender warrant under section 19(1) of the Extradition Act shall be issued forthwith accordingly.



A handwritten signature in blue ink, appearing to read "Vincent S. Perera".

Vinsent S. Perera

JUDGE

Solicitors for the Applicant : Office of the Director of Public Prosecutions, Suva.

Solicitor for the Respondent : O'Driscoll & Company, Solicitors & Barristers, Suva.