IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 129 OF 2015

THE STATE

V

RATU EPELI NIUDAMU & 15 OTHERS

Counsel: **Mr. Lee Burney & Mr. S. Babitu for State**
Mr. K. Tunidau for 1st Accused
Mr. A. Ravindra Singh for 2nd to 15th Accused

Date of Ruling: **08th of September, 2017**

RULING ON EXPERT WITNESS

1. At the closure of the prosecution case, the Court, having heard the application by the Defence of no case to answer, found in its written Ruling (read its entirety in open Court on 31st August 2017) that there was a *prima face* case against 1st to 15th Accused to answer. Putting 1st to 15th Accused to their respective defences, the Court explained their rights in defence. The Counsel for the 1st Accused, Mr. Tunidau promptly indicated that he would be calling 5 defence witnesses in addition to the 1st Accused to testify for the Defence.

2. Counsel for 2nd to 15th Accused, Mr. A.R. Singh sought time to study the Ruling to indicate his position. When the case was next called after 3 days, Mr. Singh informed Court that he was still unable to indicate his position as the Registry had not issued a copy of the written Ruling. The Court directed the Registry to issue a copy of the Ruling promptly to the Counsel and adjourned the Court for 30 minutes. When the Court resumed, only Mr. Tunidau confirmed his position and Court allowed Mr. Singh further time to come up with his position. When the 1st Accused had completed a considerable part of his evidence, Mr. Singh finally indicated that his clients wish to remain silent and that he would be calling an expert witness on international law.

3. At this stage, Mr. Burney, the Counsel for Prosecution questioned about the admissibility and relevancy of the expert evidence to the defence case and wanted in advance a *curriculum vitae* (CV) of the so called expert witness. Mr. Singh did not clearly indicate to Court as to how the expert evidence would be admissible and relevant to each Accused's case. When Mr. Singh sought permission to open his case, and address assessors, Court asked him to indicate clearly to Court as to how the expert evidence on international law would be admissible and relevant to each accused's case.

4. In his long speech of nearly two hours, Mr. Singh took up the position that his clients (2nd to 5th Accused) had done nothing wrong in signing the Uluda Declaration and Ra Petition to the International Court of Justice (ICJ), and signing and taking an oath on Ra Christian State document as they were legal documents. He said in his application for expert evidence that the Information and the documents tendered by the prosecution which are at the heart of the Prosecution case refer to the ICJ and United Nations Declaration on Rights of Indigenous Peoples (UNDRIP), and the International Labour Law Conventions and, since Prosecution witnesses failed to give evidence on those instruments in the context of international law, he should be allowed to call an expert witness on International Law.

5. Mr. Singh again failed to mention clearly as to how the expert opinion on international law would be relevant to the defence of each Accused's case. Therefore, the Court gave permission to call an expert witness upon dual condition that he disclosed in advance the CV of the witness to Court and Prosecution and subject to any objection that may be raised by the Prosecution as to the relevancy and admissibility of expert opining to his defence case.

6. Mr. Singh failed to disclose a CV until the trial resumed on 6th September, 2017. Mr. Burney filed a written submission on Admissibility of Expert Evidence in Court with some case authorities, objecting to calling the so called expert witness on the basis that the trial issues concerned the domestic law which is within the province of the trial judge alone and that the expert evidence on international law is irrelevant to any triabal issue in this case. He also objected to calling an expert witness whose credentials had not yet been disclosed.

7. When the Court resumed sitting on the 6th September, 2017, Mr. Singh tendered a copy of the CV to Court and Defence. Having gone through the document in open court, Mr. Burney vehemently objected to calling the witness and branded the CV produced in Court as one that is used to apply for a job and said that it did not necessarily make her an expert witness. He

further said that CV had no proof that the defence witness was an expert witness in Court proceedings and only a legal practitioner like him. To avoid further embarrassment to the witness, Court decided to hold in the absence of the assessors a *voir dire* to test her expertise in international law.

8. The Court reserved the Ruling on all objections raised by Prosecution while giving Mr. Singh an opportunity to reply to the submission of the Prosecution. Mr. Singh refused to file any reply to what he called a misleading submission of Mr. Burney. He asserted that he had every right to call any witness to defend his client's right to a fair trial. Mr. Tunidau, Counsel for 1st Accused later extended his solidarity to Mr. Singh's application for expert evidence.

Relevancy to Issues in the Trial

9. What the Prosecution is trying to establish in this case is not that documents Accused are alleged to have signed are illegal and therefore their acts of signing those documents are criminal. Instead, they say that, when the Accused did the particular act (signing or taking an oath), they intended either to excite disaffection against the Government of Fiji or bring the Government of Fiji into hatred or contempt or they intended to raise discontent or disaffection amongst the inhabitants of Fiji;

10. Therefore, the crucial issue in this trial is whether the Accused had a seditious intention when each of them did the alleged acts namely, signing and taking an oath.

11. 1st Accused, having admitted his signatures on both documents, maintains that he was shown only two pages and his signatures were obtained by deception or misrepresentation of facts and therefore his act of signing was not intentional. In his caution interviews, 1st Accused having agreed that the contents of Uluda declaration are seditious in nature, introduced evidence under oath as to his intention. He, having distanced himself from the contents of those documents, attempted to negate a seditious intention on his part. Therefore, interpretation of those documents in any event by an expert is totally irrelevant to 1st Accused's defence and to fact finders in coming to a conclusion as to his intention.

12. The nature of the defences taken up by 2nd to 15th Accused are different from that of the 1st Accused. In their respective caution interviews, they do not deny the acts alleged in the information, namely, signing and taking of an oath. Addressing assessors in his opening speech on behalf of all accused Mr. Singh confirmed this position. Therefore, at the end of the day, assessors and

the court are left with one question, the question as to the intention of each Accused at the time of their particular acts.

13. In the absence of evidence under oath by any of the accused, the assessors and the Court necessarily have to resort to caution statement/s of each accused, the contents of the documents they admitted to have signed and the legal presumption in the Crimes Act to form a view as to their intention.

14. 2nd to 15th Accused in their respective caution interviews had not given a uniform explanation as to why they had signed those documents. It appears that most of them had not given any clear explanation as to why they had signed and had not asserted their rights under UN treaty instruments referred to in those documents.

15. Since caution statements, which are considered as out of court statements, not given under oath and not tested in cross examination, it is entirely a matter for fact finders to decide what evidential weight should be given to their explanations.

16. Despite conflicting assertions of his clients in their respective caution statements, Mr. Singh in his opening speech appears to have taken up the position that all his clients had asserted their rights under the UN treaty instruments and signed legal documents and therefore not committed any offence.

17. Assumption of a Counsel is not evidence before this Court and cannot be attributed to test the intention of the Accused. It is to prove the Counsel's assumption that Mr. Singh has made this application to call an expert witness.

18. The legality or otherwise of the documents signed by the Accused is entirely a matter for domestic courts and has to be decided within the legal framework of this jurisdiction. An expert can express an opinion only on foreign law if his or her opinion is relevant to trial issues. Even though Section 7 of the Constitution of the Republic of Fiji allows domestic courts of Fiji, if relevant, to have regard to international law for the limited purpose of interpreting the Bill of Rights, that provision can never be used to interpret a contested document filed in this Court. Therefore, any interpretation given by an expert witness on the legality of impugned documents is totally irrelevant and of no assistance to this court to resolve the issues at hand. It must be remembered that opinion evidence, like any other, is subject to the principle of relevance. Thus comes a point where an inference, although expressed by a qualified person, if it enters upon the field of mere speculation should therefore rejected. ***Starker v R Straker v R*** (1977) ALR 103 (High Court of Australia).

19. The proposed expert witness cannot express any opinion on the intention of the Accused and not qualified to give an opinion as to the state of mind of the Accused at the time of signing of those documents. *"The expert will not be permitted to point out to the jury matters which the jury could determine for themselves or to formulate his empirical knowledge as a universal law:* ***Clark v Ryan*** (1960) 103 CLR 486 at 491 Matioli v Parker [1973] Qd R 499. Turner (1974) 60 Crim Appn R 80, per Lawton LJ.

20. The decision of the High Court in ***Clark v Ryan*** (1960) 130 CLR 486 has become a touchstone for the principles in this area of the law. In that case Dixon, CJ (with whom Fullager, J agreed) said:

> *"The rule of evidence relating to the admissibility of expert testimony as it effects the case cannot be put better than it was by J. W. Smith in the notes to Carter v Boehm, 1 Smith L.C., 7th ed. (1876) p 577. "On the one hand" that author wrote, "it appears to be admitted that the opinion of witnesses possessing peculiar skill is admissible whenever the subject matter of enquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it." Then after the citation of authority the author proceeds: "While on the other hand, it does not seem to be contended that the opinion of witnesses can be received when the enquiry is into a subject matter the nature of which it is not such as to require any peculiar habits or study in order to qualify a man to understand it." Adapted by Harding A.C.J. in R v Camm (1883) 1 Q.L.J. 136"(emphasis added).*

21. Assessors and the trial judge in this case are properly equipped to draw the proper inferences as to the state of mind of the Accused from facts placed before this Court. An expert witness should not be allowed to speculate about each accused's intention (as opposed to their motive which is irrelevant to the issues at hand) when they signed those documents.

22. General rules of admissibility also apply. For example, the expert's opinion must be relevant to a matter in issue. If the prejudicial effect outweighs the probative value the judge has a discretion to exclude the evidence: R v Elliott (unreported NSW SC 6 April 1990, Hunt, J); R v Tran (1990) 50 A.Crim.R. 233. If the expert, in drawing inferences, enters into the field of mere speculation the opinion evidence would be rejected: Straker v R (1977) ALR 103 (High Court of Australia).

Admissibility of Expert Evidence

23. The special rules applying to the admissibility of the opinion of expert witnesses have been formulated as a result of a healthy skepticism on the part of judicial officers in relation to "experts" who are essentially seen as biased because they are paid by the party calling them. The ultimate decision in each case is for the tribunal of fact and courts have been jealous to guard that territory. They do not like it being usurped by expert witnesses. Another way of looking at that might be that an impressive expert may hold undue sway with the tribunal of fact.

24. In so far as it is possible for them to do so, the Courts set themselves against receiving evidence from any witness as to the very matter which the Judge or Jury has to decide. This is because litigants are entitled to have their disputes settled by a Judge, with or without a Jury, and not by the statement of witnesses. If witnesses are too readily allowed to give their opinion concerning an ultimate issue, there is a serious danger that the Jury will be unduly influenced. Reception of evidence of opinion on the issue at hand is liable to prevent assessors from making up its own mind.

25. When juries are receiving expert evidence, it is in general the practice of the Judges to prevent the witness from stating his opinion on an ultimate issue, such as the reasonableness of the covenant in restraint of trade, the validity of patent, or the **construction of a document**. 'The admission of opinion of eminent experts upon the issue leads to the balancing of opinions and tends to shift responsibility from the bench or the Jury to the witness box'. ***Joseph Crosfield & Sons Limited v Technichemical Laboratories Limited*** (1913) 29 TLR 378 at 379. Cross on Evidence 2nd Edition, at 16.10.

26. Before a court will admit evidence of an expert it must be satisfied that the witness has the appropriate expertise. In Clark v Ryan some members of the High Court, Menzies and Windeyer, JJ., said that this rule was not complied with unless the witness gained his or her expertise from a course of study (see pp. 591-2). Dixon, CJ. and McTiernan, J. took the view that the expertise could be gained from either a field of study or as a result of practical experience (pp. 491-2, 498-99). A similar view has been taken in R v Silverlock [1894] 2 Q.B. 766.

27. A witness is therefore, allowed to state his or her opinion with regard to such matters provided he or she is expert in them. Having heard evidence of the proposed witness Ms. Mason, I am not satisfied that she is an expert witness in the field of international law who can assist this court to resolve the issues

before this Court although it appears that she has some qualifications to assist the New Zealand government on indigenous issues.

28. The CV of the so called expert witness was not disclosed to the Prosecution until the last moment thereby denying the Prosecution an opportunity to scrutinize her credentials and qualifications. No certificate of her expertise and experience was tendered in her evidence to support her evidence. The opportunity and time given to the Prosecution to attack the credibility of the witnesses' credentials and qualification was dangerously limited.

29. Ms. Mason admitted that being a legal practitioner admitted to the New Zealand Bar it is improper for her to give evidence as an expert witness in New Zealand Jurisdiction. She admitted that she was admitted as a Barrister and Solicitor of the Courts of the Republic of Fiji. Therefore it highly improper to call her as an expert witness in this Court. She has never assisted any court of law with her expertise as an expert witness in international law.

Right to Call Defence Witnesses

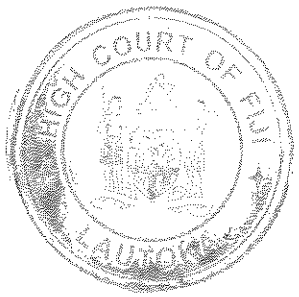
30. Mr. Singh argued that Accused must be given their right to a fair trial and he is entitled to call any witness to safeguard his clients' interests. While admitting that accused persons are entitled to have a fair trial I am not inclined to accept his argument that he can call any witness.

31. In ***Polyakov v. Russia*** 29 January 2009, ECtHR, App no 77018/01 European Court of Human Rights (ECtHR) pointed out that the right to call witnesses by the Defence was not absolute and could be limited in the interest of the proper administration of justice (para. 31). An applicant claiming a violation of his right to obtain the attendance and examination of a defence witness should show that the examination of that person was necessary for the establishment of the truth and that refusal to call that witness was prejudicial to the defence rights. (see Guilloury v. France, no. 62236/00, § 55, 22 June 2006).

32. In that case, the applicant complained that the domestic courts had arbitrarily rejected his requests to examine several witnesses whose testimony would confirm his alibi (para. 27).

33. In the present case, Mr. Singh's request for defence expert witness is vexatious, not sufficiently reasoned, relevant to the subject-matter and could not arguably have strengthened the defence position.

34. For reasons given, application to call Ms. Mason as an expert witness for Defence is refused.



Aruna Aluthge
JUDGE

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