

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CRIMINAL JURISDICTION**

**Crim. Case No: HAC 361 of 2016**

**STATE**

**v.**

- 1. JOSAIWA WAQABACA**
- 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

**Ruling:** 23<sup>rd</sup> October 2017

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**RULING**

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**Introduction**

- i. This matter was called on the 3<sup>rd</sup> of October 2017, for the prosecution to file amended information. However, instead of filing the amended information as ordered by the court, the learned counsel for the prosecution Mr. Burney has filed a written submission under the heading "State's further submissions on manner of providing further particulars" on 15<sup>th</sup> of September 2017.

2. The learned counsel for the prosecution has submitted in this written submission that the prosecution considers that there is no need to further amend the amended information. Moreover, the learned counsel has further submitted that the ruling dated 27<sup>th</sup> of July, 2017 has only ordered the prosecution to provide further particulars for the accused to properly comprehend the nature of the charges that have been filed against them. According to the written submission, the learned counsel for the prosecution finds that the Criminal Procedure Act has not specifically provided the procedure or the manner in which the prosecution has to provide further particulars of the offence. Having submitted such, the learned counsel suggested that the court could rely on the practices of the High Court of Justice in England in accordance with Section 202 (2) of the Criminal Procedure Act.
3. Unfortunately, Mr. Burney was not present in Court on the 3rd of October 2017, to explain the court about the purpose of this written submission. Mr. Prasad, who appeared for the prosecution on the 3rd of October 2017, was not in a position to assist the court much. Having carefully considered the written submissions filed by Mr. Burney, I found that Mr. Burney has misapprehended the correct procedure of filing amended information and the orders given by the court. I accordingly directed the prosecution and the defence to file further submissions on the issue of the procedure of filing amended information, which the learned counsel for the prosecution and the 2nd accused filed as per the directions.
4. The learned counsel for the prosecution, Mr. Burney in his written submission filed on the 5th of October 2017, again submitted that there is no need to further amend the amended information filed on the 23rd of March 2017. It is only required to file further particulars as no further amendment is required. Having submitted such, the learned counsel in the last two paragraphs of his written submission has alleged and criticized the conduct of the learned counsel for the defence, stating their conduct have detrimentally affected the efficient administration of justice.
5. In view of the written submissions filed by the prosecution and the second accused, I find the learned counsel for the prosecution has misapprehended and/or misconstrued the applicable provisions of the Criminal Procedure Act pertaining to the amendment of

the information, filing of particulars of offence and the orders given by this court in its ruling dated 27th of July 2017.

6. In view of these reasons and in order to proceed this matter expediently without unnecessary delay, it is prudent to clarify in this ruling, the following issues:
  1. Is there properly filed amended information against the 2nd, 3rd, 4th and 5th accused?
  2. Whether the ruling dated 27th of July 2017 has ordered the prosecution to provide complete particulars of the offence or further particulars?
  3. What is the proper and correct form of filing complete particulars of offence?

#### **Background**

7. The first, second, third, fourth and fifth accused were initially charged in the Magistrate's Court on the 16th of August 2016 for one count of "Inciting Communal Antagonism" contrary to Section 65 (2) (a) (i) of the Crimes Act. All the accused have elected to have the hearing in the High Court, pursuant to Section 4 (1) (b) of the Criminal Procedure Act. Hence, the learned Magistrate has transferred this matter to the High Court on the 6th of October 2016. This matter was first called in the High Court on the 14th of October 2016. The Prosecution has then filed an information, charging all five accused with one count of Inciting Communal Antagonism, contrary to Section 65 (2) (a) (i) of the Crimes Act on the 13th of October 2016.
8. Subsequent to several adjournments, the learned counsel for the defence raised an objection on the 7th of February 2017 on the ground of defectiveness of information. The learned Counsel for the prosecution, Mr. Prasad sought time to consider the charges as he wanted to discuss it with his senior counsel, Mr. Burney. The court granted time accordingly and adjourned the matter till 9th of March 2017. On the 9th of March 2017, the learned counsel for the prosecution Mr. Prasad sought further twenty one days to consider the charge. Accordingly the matter was adjourned till 28th of March 2017.

9. Meanwhile, I found that the prosecution has filed two sets of amended information on the 23rd of March 2017 at the Registry. The first such amended information was filed at 11:45 a.m. on 23rd of March 2017 and the second amended information has been filed at 3.35 p.m. on the 23rd of March 2017.
10. On 28th of March 2017, the learned counsel for the prosecution, Mr. Prasad made an oral application to amend the information, for which the learned counsel for the defence made their objections. Mr. Prasad, in his application did not specify whether the prosecution wants to amend the information as per the said amended information filed on the 23rd of March 2017. The objections of the defence and the responses of the prosecution were mainly founded on the particulars of offences as stated in the two sets of amended information, that were filed by the prosecution on the 23rd of March 2017. I accordingly gave directions to file their respective written submissions, which they filed as per the directions. On 18th of May 2017, the court heard the oral arguments and submissions of the counsel for the prosecution and the defence on the issue of amendment to the information. Having carefully considered the respective written and oral submissions of the parties, the court delivered the ruling on 27th of July 2017, concluding that the particulars of offences, as set out in the two sets of amended information in respect of second, third, fourth and fifth counts are incomplete. The court further ruled that such incompleteness could prevent the accused to properly comprehend what the prosecution alleges against them. Having ruled such, the court ordered the prosecution to provide those particulars of the information.
11. The learned counsel for the Prosecution Mr. Prasad, then sought time to file the amended information in respect of the second, third, fourth and fifth counts according to the said ruling, for which the court allowed and granted time till 4th of September 2017. Meanwhile, the learned counsel for the first accused informed the court that he does not have any objection for the first count as stated in the proposed amended information filed at 3.35 pm on the 23rd of March 2017, in which the first accused has been charged with one count of Sedition contrary to Section 67 (1) (a) of the Crimes Act. At that point of time, the learned counsel for the prosecution made an oral application to disregard the proposed amended information filed at 11.45 am on the 23rd of March 2017.

12. Instead of filing amended information as ordered by the court, the prosecution has filed a document under the signature of Mr. Burney on the 28th of August 2017, stating as "State's Further Particulars". However, Mr. Prasad who appeared for the prosecution on the 4th of September 2017, accepted in the court that neither there is provision to file such a document stating as "Further Particulars" nor such order by the court to file such a document. Mr. Prasad then made an application seeking further time to file amended information. Having granted the said application, the court adjourned the matter till 3rd of October 2017 for amended information.
13. Meanwhile, the learned counsel for the prosecution, Mr. Burney in order to assist the court on the question whether the written particulars are the appropriate procedure in complying with the ruling has filed a written submission in the Registry of the High Court on the 25th of September 2017. The learned counsel submitted that the Criminal Procedure Act has not specifically provided the procedure to file further particulars; hence, the court could rely on the practices adopted by the High Court of Justice in England.
14. Mr. Prasad, the learned counsel who appeared for the prosecution on the 3rd of October 2017, submitted that he now wants to change the application which he made on the 4th of September 2017, seeking further time to file amended information. Having carefully considered the written submissions filed by Mr. Burney and the applications made by Mr. Prasad, it appears that the prosecution has misapprehended the correct procedure of amending the information and filing complete particulars of the offence as stipulated under the Criminal Procedure Act.

### **Law and Analysis**

15. Having briefly discussed the background of these proceedings, I now draw my attention to the laws pertaining to the filing and amending of information.
16. According to Section 198 (1) of the Criminal Procedure Act, the prosecution has to file the information within 21 days of the order from transfer. The court may grant leave to extend the period of 21 days. Section 198 (1) of the Criminal Procedure Act states that:

*"An information charging an accused person and drawn up in accordance with section 202 shall be filed by the Director of Public Prosecutions or by the Commissioner or Deputy Commissioner of the Fiji Independent Commission Against Corruption with the Chief Registrar of the High Court within 21 days of the order for transfer except that the High Court may grant leave to extend the 21 days. The power of the Director of Public Prosecutions to file information may be delegated by him to a public prosecutor in writing."*

17. Once the prosecution files the information pursuant to Section 198 (1), it can only be amended according to Section 214 (2) and 214 (9) of the Criminal Procedure Act.
18. According to Section 214 (2) of the Criminal Procedure Act, the court would make necessary order for amendment of the information if it appears to the court that the information is defective. Section 214 (2) of the Criminal Procedure Act states that:

*"Where, before a trial upon information (or at any stage of such trial), it appears to the court that the information is defective, the court shall make such order for the amendment of the information as the court thinks necessary to meet the circumstances of the case, unless the required amendments cannot be made without injustice; having regard to the merits of the case".*

19. The court would grant leave to amend the information upon an application made by the prosecution pursuant to Section 214 (9) of the Criminal Procedure Act. Section 214 (9) of the Criminal Procedure Act states that;

*"The Court may, upon application by the prosecution, grant leave to amend an information, whether by way of substitution or addition of charges or otherwise".*

20. In granting leave to amend the information pursuant to Section 214 (9) of the Criminal Procedure Act, the court has to consider whether the amendment could embarrass the accused in his defence, where Section 214 (10) stipulates that:

*"In deciding whether or not to grant leave, the Court may consider whether the amendment might embarrass the accused in his defence and whether such embarrassment might be appropriately mitigated by way of adjournment of trial".*

21. Accordingly, the prosecution has to file the information within 21 days of the order for the transfer to the High Court, unless the court grants leave to extend the stipulated time of 21 days. Once the prosecution files the information pursuant to Section 198 (1) of the Criminal Procedure Act, it can only be amended according to the procedure as stipulated under Section 214 (2) and (9) of the Criminal Procedure Act.
22. In this matter, the prosecution has filed one amended information at 11:45 am on the 23rd of March 2017 without properly making an application to amend the information pursuant to Section 214 (9) of the Criminal Procedure Act. The prosecution neither made any application before filing this amended information nor the court has granted leave to amend the information in this manner.
23. On the same day, that was 23rd of March 2017, the Prosecution has filed another amended information at 3:25 pm. Once again, neither the prosecution has made any application to amend the information nor the court has granted leave to amend the information pursuant to Section 214 (9) of the Criminal Procedure Act.
24. Hence, these two amended information filed by the prosecution at 11:45 am and 3:25 pm respectively on the 23rd of March 2017, have not been filed according to the procedure as stipulated under Section 214 (9) of the Criminal Procedure Act.
25. Since the learned counsel for the prosecution made an application to disregard the amended information filed by the prosecution at 11:45 am on the 23rd of March 2017, I do not further consider the said document.

26. The learned counsel for the prosecution, Mr. Prasad on the 28th of March 2017, made an oral application to amend the information, for which the learned counsel for the second, third, fourth and fifth accused objected. The learned counsel for the first accused initially objected for the amendment, but later informed the court that the first accused has no objection for the amendment.

27. The objections of the defence are mainly focused on the document filed by the prosecution on the 23rd of March 2017 as "amended information". However, these objections of the defence were raised before the leave was granted to amend the information. Moreover, the said amended information was never read over to the accused person. Therefore, the objections raised by the defence cannot be considered as objections raised in respect of any formal defect of the information under Section 214 (1) of the Criminal Procedure Act. Section 214 (1) of the Criminal Procedure Act stipulates that:

*"Every objection to any information for any formal defect on the face of it shall be taken immediately after the information has been read over to the accused person, and not at a later time."*

28. Part XVI of the Criminal Procedure Act, has stipulated the procedure in trials before the High Court. Division one of Part XVI consists of Section 202 and 203 of the Criminal Procedure Act, which deals with the practices of the High Court in its criminal jurisdiction.

29. Section 202 of the Criminal Procedure Act states that:

*i) The practice of the High Court shall be applied as determined by a judge hearing any criminal proceeding or trial, and shall be as is —*

*a) prescribed by the provisions of this Decree, and any Regulations made under this Decree;*



- b) prescribed by the provisions of any Act Decree or Pronulgation relating to the administration and jurisdiction of the High Court;
- e) provided for in any Practice Direction issued from time to time by the Chief Justice.

*It Subject to sub-section (1), the practice of the High Court in its criminal jurisdiction shall be as nearly as circumstances will admit to the practice of High Court of Justice in England, and the inherent powers of the High Court of Justice shall be deemed to be the inherent powers exercisable by the judges of the High Court in Fiji.*

30. Accordingly, the court in conducting a hearing in the High Court, has to follow the procedure as prescribed in the Criminal Procedure Act. Hence, I find that the amended information that was filed without obtaining leave of the court on 23rd of March 2017 cannot be considered as properly amended information pursuant to Section 214 (9) of the Criminal Procedure Act.
31. The court could consider the said amended information filed on 23rd of March 2017, as the proposed amended information by the prosecution as the objections of the defence and the subsequent responses of the prosecution were mainly focused on the particulars of offences as stated in the said proposed amendment. Unfortunately, the court has omitted to refer the said amended information as proposed amended information in its ruling dated 27th of July 2017.
32. The court found that the particulars of offences as stated in the said proposed amended information are not completed in respect of second, third, fourth and fifth counts. Accordingly the court ordered the prosecution to provide certain information in order to provide complete particulars of offences in the amended information.
33. The learned counsel for the Prosecution, Mr. Prasad, correctly, sought time on the 27th of July 2017, to file an amended information with complete particulars of offence as ordered by the court. The court then granted leave and adjourned the matter till 9th of August 2017 to file the amended information.

34. Accordingly, the correct procedure is, to file an amended information with complete particulars of offences as ordered by the Court, if the prosecution wishes to amend the charges as stated in the proposed amended information.
35. The correct form of filing the information, including the statement of offence and the particulars of offence has stipulated under Section 61 (6) of the Criminal Procedure Act.
36. I now draw my attention to the last two paragraphs of the written submission filed by Mr. Burney on the 5th of October 2017. I find the comments made by Mr. Burney regarding the learned counsel for the defence in these two paragraphs are completely unnecessary and unwarranted. According to Section 51 of the Legal Practitioners Act, the lawyers, who are practicing in court, are considered as officers of the court. The paramount obligation of such officers of the court is to assist the court to properly and expediently administer justice. Hence, lawyers are part of the solution, and not part of the dispute before the court. I trust the learned counsel for the prosecution and the defences are fully aware of their noble responsibility as officers of the court, and would refrain from making this kind of unwarranted comments.
37. In order to avoid further confusions and delay, I once again grant leave to the prosecution to file amended information with complete particulars of offences as ordered on the 27th of July 2017.



  
R.D.R.T. Rajasinghe  
Judge

At Suva  
23<sup>rd</sup> October 2017

**Solicitors**

Office of the Director of Public Prosecutions for the State  
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