

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, Ms. U. Tamanikaiyaroi and Mr. Y. Prasad for State
Mr. Ravindra Singh A. for Accused 1
Mr. D. Sharma for Accused 2
Mr. N. Barnes, Mr M. A. Corlett (QC) for Accused 3 & 4
Mr. W. Clarke for Accused 5

Hearing: 30th April 2018, 1st, 2nd, 3rd, 4th, 7th, 8th, 9th, 10th May 2018

Summing Up: 18th May 2018

Judgment: 22nd May 2018

JUDGMENT

Introduction

1. The first accused Mr. Josaiwa Waqabaca, is being charged with one count of Sedition, contrary to Sections 67 (1) (a) and 66 (1) (v) of the Crimes Act, the particulars of the offence are that:

JOSAIA WAQABACA between the 20th and 27th April 2016 at Suva in the Central Division did a seditious act, namely submitted an article written by him for publication in the *Nai Lalakai* newspaper with an agreed English translation with a seditious intention to promote feelings of ill-will and hostility between different classes of the population of Fiji namely between non-Muslims and Muslims.

2. The second accused Mr. Anare Ravula, is being charged with one count of aiding and abetting Sedition, contrary to Sections 67 (1) (c), 66 (1) (x) and 45 of the Crimes Act, the particulars of the offence are that:

ANARE RAVULA on or about the 27th April 2016 at Suva in the Central Division aided and abetted Hank Arts to publish an article in the *Nai Lalakai* newspaper published on 27th April 2016, together with an agreed English translation which was a seditious publication in that it had a tendency to promote ill-will and hostility between different classes of the population of Fiji, namely between non-Muslims and Muslims ('the said seditious publication'). As the editor of *Nai Lalakai* newspaper Anare Ravula was under a contractual duty to assist Hank Arts to publish the 27th April 2016 edition of *Nai Lalakai* newspaper by ensuring editorial standards were maintained, including a duty to prevent the publication of any seditious publication therein, and his failure to prevent the publication of the said seditious publication aided and abetted Hank Arts to publish the said seditious publication.

3. The third accused Mr. Fred Wesley, is being charged with one count of aiding and abetting Sedition, contrary to Sections 67 (1) (c), 66 (1) (x) and 45 of the Crimes Act, the particulars of the offence are that:

FRED WESLEY on or about the 27th April 2016 at Suva in the Central Division aided and abetted Hank Arts to publish an article in the *Nai Lalakai*

newspaper published on 27th April 2016, together with an agreed English translation which was a seditious publication in that it had a tendency to promote ill-will and hostility between different classes of the population of Fiji namely between non-Muslims and Muslims ('the said seditious publication'). As the editor-in-chief of *Nai Lalakai* newspaper Fred Wesley was under a contractual duty to assist Hank Arts to publish the 27th April 2016 edition of *Nai Lalakai* newspaper by ensuring editorial standards were maintained, including a duty to prevent the publication of any seditious publication therein, and his failure to prevent the publication of the said seditious publication aided and abetted Hank Arts to publish the said seditious publication.

4. The fourth accused, Mr. Hank Arts is being charged with one count of Sedition, contrary to Section 67 (1) (c) and 66 (1) (v) of the Crimes Act, the particulars of the offence are that:

HANK ARTS on the 27th April 2016 at Suva in the Central Division as the publisher of *Nai Lalakai* newspaper did publish an article in the 27th April 2016 edition of *Nai Lalakai* newspaper, together with an agreed English translation which was a seditious publication in that it had a tendency to promote ill-will and hostility between different classes of the population of Fiji namely between non-Muslims and Muslims.

5. The fifth accused, The Fiji Times Limited, is being charged with one count of Sedition, contrary to Section 67 (1) (c) and 66 (1) (v) of the Crimes Act, the particulars of the offence are that:

FIJI TIMES LIMITED a company having its registered office at 177 Victoria Parade, Suva, on or about the 27th April 2016 at Suva in the Central Division as the printer of *Nai Lalakai* newspaper did print the 27th April 2016 edition of *Nai Lalakai* newspaper which contained an article, together with an agreed English translation which was a seditious publication in that

it had a tendency to promote ill-will and hostility between different classes of the population of Fiji namely non-Muslims and Muslims.

6. All the five accused pleaded not guilty for their respective charges. Hence, the matter proceeded to hearing. The hearing commenced on 30th of April 2018 and concluded on the 10th of May 2018. The prosecution presented the evidence of four witnesses and tendered eleven documents as the exhibits of the prosecution. Mr. Waqabaca, Mr. Royula and Mr. Arts opted not to give any evidence; Mr. Wesley gave evidence and also called four witnesses for his defence. The Fiji Times Limited called two witnesses for their defence. Subsequently, the learned counsel for the defence and the prosecution, made their respective closing addresses. I then delivered my summing up.
7. The three assessors returned with unanimous opinion of not guilty for all of the five accused in respect of the each count that they have been charged with.
8. Having carefully considered the evidence presented during the hearing, the respective closing addresses of the learned counsel for the defence and the prosecution, the summing up and the unanimous opinion of not guilty given by the three assessors, I now proceed to pronounce my judgment as follows:

The Law

9. Sedition is a crime against the State, or the authority of the government. The purpose of this offence is to prevent any unlawful attack on the tranquility of the State. Sedition covers everything, whether by words, deeds, or writing which is calculated to disturb the tranquility of the State and leads ignorant persons to endeavour to subvert the government and the laws of the State. (R v Sullivan (1868) 11 Cox CC 44), Reg v Burns and others (1886) 16 Cox 355, State v Riogi (2001) FJHC 61; HAA0060j,2001s (20 August 2001), State v Mua (1992) FJCA23;AAU001u,91s (27 November 1992).

10. The prosecution has charged that Mr. Waqabaca has submitted an article, written by him, for the publication in the *Nai Lalakai* newspaper, which was published on the 27th of April 2016. The prosecution alleged that this article, written by Mr. Waqabaca, is a seditious article, as it has a tendency to promote the feelings of ill-will and hostility between the Muslims and non-Muslim population of Fiji. The fourth accused, Mr. Hank Arts has been alleged that he published this alleged seditious article in the *Nai Lalakai* newspaper on the 27th of April 2016. The second and the third accused, Mr Ravula and Mr. Wesley, are being charged for aiding and abetting Mr. Arts to publish this seditious article. The fifth accused, the Fiji Times Limited, is being charged for the printing of this article in the *Nai Lalakai* newspaper on the 27th of April, 2016.
11. All of these five counts are based upon one document that is, the article written by Mr. Waqabaca, which was published and printed in the *Nai Lalakai* newspaper on 27th of April 2016.

Case of the Prosecution

12. The learned counsel for the prosecution in his opening address outlined the case of the prosecution. Accordingly, the prosecution alleges that this article, if taken into consideration in its entirety, says that Muslims are land-grabbing monsters who rape, murder, and abuse children. The learned counsel for the prosecution further said that this article says that unless the readers of *Nai Lalakai* take action, these Muslim monsters would take over Fiji just as they have done in Bangladesh. The language used in this article is extremely inflammatory and it could lead to serious consequences involving public disorder, creating ill-will and hostility against Fijian Muslims.
13. On the contrary, the defence claims that this article has no such meaning as stated by the prosecution. Instead, this article suggests to have a national reconciliation in view of resolving the important issues that the indigenous people of Fiji feel, as those issues will cause great instability in future. Moreover, the second, third, fourth and fifth accused

claim that they have no knowledge about this article hence, they had no intention of knowledge to commit this crime.

14. Accordingly, the court is required to determine whether this article is seditious. In determining whether this article is seditious, I adopt a test consisted of two stages, the first is to determine the meaning of this article and then to determine whether it has a tendency or capacity to promote feelings of ill-will and hostility between the Muslims and non-Muslim population of Fiji.
15. Before I venture into consider the meaning of this article, I find it is prudent to discuss the required fault elements of the offence of Sedition.
16. Section 66 (1) (i) to (v) of the Crimes Act has stipulated the seditious intention, where it states that:

(i) A "seditious intention" is an intention—

- h) to bring into hatred or contempt or to excite disaffection against the Government of Fiji as by law established, or*
- e) 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*
- d) to bring into hatred or contempt or to excite disaffection against the administration of justice in Fiji; or*
- v) to raise discontent or disaffection amongst the inhabitants of Fiji; or*
- f) to promote feelings of ill-will and hostility between different classes of the population of Fiji;*

17. However, Section 66 (1) (a) to (d) of the Crimes Act states that the alleged act, speech or the publication is not seditious if it was done with the intention:

- 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.*

18. Section 66 (2) of the Crimes Act states that:

“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.”

19. The learned counsel for the prosecution argued, during the legal submission on the proposed directions on law that Section 66 (2) creates a presumption that the accused has intended the consequence, which would naturally follow from his seditious conduct. Accordingly, the prosecution has to prove that this article written by Mr. Waqabaca, published by Mr. Arts and printed by the Fiji Times Limited is seditious on the ground that it has a tendency to promote feelings of ill-will and hostility between the Muslims and non-Muslim population of Fiji. The court could then presume that Mr. Waqabaca, Mr. Arts and The Fiji Times Limited have intended the natural consequences of their respective acts of seditious writing, publication and printing, that is to promote the feelings of ill-will and hostility between Muslims and non-Muslim population of Fiji, unless the contrary is proved by the defence. The learned counsel further argued that the defence has to

discharge their burden in rebutting the said presumption on the balance of probabilities, which is a legal burden as stipulated under Sections 60 and 61 of the Crimes Act.

20. The learned counsel for the prosecution relied on State v Nindamu [2017] FJHC 145; HAM30.2017 (27 February 2017), where the High Court has held that:

“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.

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.

*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."

21. Section 60 of the Crimes Act, deals with the legal burden of proof on the defence, where it states that:

- a) A burden of proof that a law imposes on the defendant is a legal burden if and only if the law expressly*
- b) specifies that the burden of proof in relation to the matter in question is a legal burden; or*
- c) requires the defendant to prove the matter; or*
- d) creates a presumption that the matter exists unless the contrary is proved.*

22. In order to impose a legal burden of proof on the defence, the law has to expressly stipulate that there is a presumption unless the contrary is proved. Section 66 (2) of the Crimes Act has not specifically stated that there is a presumption of the seditious intention unless the contrary is proved. The section or the law, that creates such a rebuttable presumption, must have specifically and expressly stated that such presumption exists. For an example, I could refer to Section 32 of the Illicit Drugs Control Act of 2004, where it states that:

"Where in any prosecution under this Act it is proved that any illicit drug, controlled chemical or controlled equipment was on or in any premises, craft, vehicle or animal under the control of the accused, it shall be presumed, until the contrary is proved, that the accused was in possession of such illicit drug, controlled chemical or controlled equipment."

23. Section 32 of the Illicit Drugs Control Act of 2004, has specifically and expressly stated that, "it shall be presumed until the contrary is proved" thus, shifting the legal burden on the defence pursuant to Section 60 (3) of the Crimes Act. On the contrary, the drafters of

Section 66 (2) of the Crimes Act have not used such words in similar nature to create a presumption, similar to Section 30 of the Illicit Drugs Control Act of 2004.

24. The word “deemed” has been defined in the Black’s Law Dictionary, 10th Edition, in page 504 as that:

(1) *To treat (something) as if (i) it were really something else, or (2) it has qualities that it does not have < although the document was not in fact aged until April 21, it explicitly states that it must be deemed to have been signed on April 14>*

(11) *To consider, think or judge < she deems it necessary>*

“Deem” has been traditionally considered to be a useful word when it is necessary to establish a legal fiction either positively by “deeming” something to be what it is not or negatively by “deeming” something not to be what it is....

All other uses of the word should be avoided... phrases like “if he deems fit” or “as he deems necessary” or “nothing in this Act shall be deemed to” ... are objectionable as unnecessary deviations from common language. “Think” or “consider” are preferable in the first two examples and “construed” or “interpreted” in the third..... “Deeming” creates an artificiality and artificiality should not be restored to if it can be avoided” G.C Thornton, Legislative Drafting 99 (4th Ed.1996).

25. Black’s Law Dictionary 10th Edition, at page 1376 has defined “ presumption” as that:

(1) *Something that is thought to be true because it is highly probable.*

(11) *A legal inference or assumption that a fact exists because of the known or proven existence of some other facts or groups of facts. Most presumptions are rules of evidence calling for a certain result in a given case unless the adversely affected party overcome it with other evidence. A presumption*

shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption.

26. It appears that the word "presumption" has a more conclusive meaning unless the contrary is proved, than the word "deem". The word "deem" allows the court to construe a fact that could not be actually existing. It is a legal fiction.
27. Section 66 (2) of the Crimes Act, has actually provided an assistance, in order to determine the seditious intention of the accused. Accordingly, in order to determine whether the intention of any act or any document was published, is seditious, the court can deem that the accused has intended the natural consequence of such an act or the publication. In order to determine the said natural consequence, the court has to take into consideration the time and the circumstances under which the said act or the publication was done.
28. Actually, this deeming provision has allowed the court to construe an objective intention. However, the onus is still on the prosecution to adduce evidence to establish and prove what the accused intended to convey in committing this offence. The prosecution has to prove beyond reasonable doubt that the said deemed intention of the accused is the only inescapable and indisputable inference of the intention of the accused. Therefore, I do not concur with the submissions made by the learned counsel for the prosecution in respect of the definition and the application of Section 66 (2) of the Crimes Act.
29. If the defence seeks to rely on one or few of the grounds that have been stipulated under Section 66 (1) (a) to (d) of the Crimes Act, the evidential burden will then shift on the defence pursuant to Section 59 of the Crimes Act. The defence can discharge this evidential burden by adducing or pointing out any evidence that suggests a reasonable possibility of the existence of the ground that the defence relies on. However, still the onus is on the prosecution to disprove beyond reasonable doubt that none of the grounds as stipulated under Section 66 (1) (a) to (d) had an application to this matter. (*vide Section 58 of the Crimes Act*).

30. Bearing in mind the above discussed legal principles of the seditious intention and the onus and the standards of the proof, I now proceed to determine the meaning of this article.
31. According to the evidence presented during the hearing, the *Nai Lalakai* is mainly read by the *i-Taukei* community who live in rural and outer islands. The elders are the main readership of this newspaper. Therefore, the court needs to determine how this article was interpreted or understood by these *i-Taukei* readerships. Accordingly, this article is required to be read and understood from the eyes and minds of a reasonable, sensible and fair minded *i-Taukei* reader, in order to determine how this reasonable, sensible and fair-minded *i-Taukei* reader understood this article as a whole.
32. In applying this objective test, the court can take into consideration the context of the circumstances under which this article was written or published. Accordingly, the court is required to consider the nature of leadership, their behaviours in social, financial and cultural spheres, the effect or the influence of the issues that have been discussed in the article, the social, financial, historical and demographical context of these two classes of the population in Fiji. Accordingly, it is the onus of the prosecution to present evidence to establish the prevailed circumstances or the context, under which this article was written and published in order to determine the meaning of it.
33. The offence of sedition completes once you write and publish an article that has a capacity to promote feelings of ill-will and hostility between different classes of the population with the required seditious intentions (*vide Reg v Burns and others (supra)*). It is not necessary, at all, that this offence of seditious publication is followed by an actual riot or disturbance of the public order. It is because, a man cannot escape from the consequence of writing or publishing seditious words with the necessary seditious intention, solely because the audience or the readership to whom it was addressed may be too wise or too temperate to ignore or not to react to it. However, the reaction of the readership can be taken into consideration in order to understand the actual meaning of this article.

34. As discussed above, in order to discharge their evidential burden in establishing that this article has actually suggested to have a national reconciliation in order to solve main issues pertaining to *I-Taukei* community, which might cause great instability in future, if not resolved, the defence is only required to adduce or point out some evidence that suggest a reasonable possibility, that this article has suggested to have a national reconciliation.
35. The first paragraph of the article says that a petition has been given to Hon. Attorney General requesting him to take one of the two options stated in part one and two of the first paragraph. The first option is to conduct a national reconciliation in view of all the important issues that the indigenous people of Fiji feel (and) will cause great instability in the future. The writer has stated few issues, they are the social and political instabilities and the judicial imbalance. Mr. Waqabaca has further requested to conduct this proposed reconciliation based on Ten Commandments. If the Hon. Attorney General fails to conduct such reconciliation, he should resign and leave the country and never return.
36. Second and third paragraphs discuss about a petition of one William Marshal. Mr. Katonitabua, the first witness of the prosecution, and IP Nadolo, the investigation officer, in their respective evidence admitted that they have not done any investigation to clarify whether Mr. Waqabaca has actually given a petition to Hon. Attorney General.
37. The third paragraph talks about the debt of the country. It says that William Marshal in his petition, has said that the future generation will be burdened with payment of all these large debts and they will have a big job in clearing them. The next paragraph says that if they are unable to do that, their land will be taken away from them.
38. The sixth paragraphs discuss about what the Muslims have done in Bangladesh and said that the Muslims are not indigenous Fijian. The seventh paragraph talks about the alienation of native lands in Serua, Lodonu, Namena and Dawasamu. Mr. Katonitabua in his evidence admitted that there are some historical grievances regarding the traditional ownership of the lands in these areas. *I-Taukei* people in these areas have a sense of grievance about the conversion of their lands to freehold lands by the colonial rulers in

1880s. They still carry these grievances and the government has already initiated a process to address these grievances by making arrangements to return those lands back to traditional owners.

39. The ninth paragraph says that various United Nations' regulations were formulated, so that indigenous people would continue to obey a foreign voice. They have come and continued to legislate in our country so that they can own our land, because of our inaction. This paragraph further talks about that indigenous people were taken away to go and fight overseas, and for that they were paid well.
40. The eleventh paragraph says that the Hon. Attorney General has been requested to have some consideration for the indigenous people and give them an opportunity to solve the enormous problems that could eventually lead to the extinction of their race, just as the actions of Muslims in Bangladesh have led to them taking over the country.
41. Rest of the article discuss about the methods of changing of government as it can be done through election, coups and also with the direct command of the God. Mr. Waqabaca suggests to the readers to be pure at heart and resolute and considerate of all, as the God's promises will be realized. He says that we should be good Christians. He says that it is difficult to interfere with the plans of the God.
42. It is clear that in two separate instances, this article talks about Muslims. In paragraph six, after mentioning that Muslims are not indigenous Fijian, it has referred to some event that the writer claims, had taken place in Bangladesh. The second instance is paragraph eleven, where it says that the Hon. Attorney General has been requested to have some consideration for the indigenous people and give them an opportunity to solve the enormous problems that could eventually lead to the extinction of their race, just as the actions of Muslims in Bangladesh have led to them taking over the country.

43. The court has to determine how these two instances of reference about Muslims in this article are being understood within the full context of this article, by a reasonable, sensible and fair minded *i-Taukei* reader of *Nai Lalakai*.
44. Mr. Katonitabua in his evidence admitted that this article actually proposes to conduct a National Reconciliation in order to resolve issues pertaining to *i-Taukei* communities. He further said that the idea of National Reconciliation is a way-forward in order to address certain perceptions which are still existing among the *i-Taukei* communities regarding the reforms carried out by the government on the issues of land and ethnicity. He said that the efforts made by the Ministry of *i-Taukei* Affairs to correct those perceptions have met with mixed results so far.
45. I find the fact, that there were no reactions from the *i-Taukei* readership after the publication of this article in *Nai Lalakai* on the 27th of April 2016, would assist me to understand the meaning of this article.
46. This article not only talks about Muslims. It also talks about some foreigners. According to paragraph nine of the article, it is alleged that these foreigners legislate the regulations in order to own the land. There is no specific mention whether these foreigners are Muslims or not. Though, paragraph six has discussed about what Muslims did in Bangladesh, there is no any reference or suggestions that it would happened in Fiji in the same manner, apart from the reference made in paragraph eleven.
47. Paragraph eleven should not be read or understood in isolation. It has to be understood within the full context of this article as a whole. Paragraph eleven requests the Hon. Attorney General to have some consideration for Indigenous people and give them an opportunity to resolve the enormous problems that could eventually lead to the extinction of the ingenious people just as the actions of Muslims in Bangladesh have led to taking over the country.

48. What are the enormous problems that have been mentioned in the article? Paragraphs three and four talk about that if the future generation fails in repayment of the large debt, it would lead to taking their lands away from them. Paragraph nine talks about the foreigners who are legislating regulations to take the country, Mr. Katonitabua admitted that there are historical grievances regarding the land ownership in the areas as mentioned in paragraph seven of the articles. The government has already identified these issues and taken steps to return these lands back to the original owners.
49. I now take my attention to the caution interview of Mr. Waqabaca, which was tendered in evidence by the prosecution. The first accused neither challenged nor objected to the truthfulness of the caution interview.
50. In answering to question 68 posed to him by the police officer, asking him to explain the contents of this letter, *Lewa Ni Nofusitaki*. Mr. Waqabaca has answered that he has put into this letter whatever he heard from the people, I will reproduce the verbatim of the answer as follows:

"Whatever was collected was told by the people and I put into a letter. That there should be a national reconciliation done in Fiji wide to solve the ill feelings amongst all citizens. This is regards to the debt that our grandchildren will have to pay. Because all these debts are now securities to all those countries who gave money to Fiji. Another concern is the Muslims can take Fiji as it happened in Bangladesh. Some places in Fiji are now freehold like Namena, Lodon, Dawasumu some places in the 14 provinces where they have freehold land. We are talking about Moori and Aho but we are not concerned with the problems we are facing now. This was the heart of the letter that I wrote and also the foundation of change within the government if we want to."

51. According to this answer, which is the part of prosecution's evidence, it suggests that Mr. Waqabaca wanted to have a reconciliation in order to resolve all the ill feelings among the

citizens. He has compiled the issues of the people which he heard. One of the issues is debt and other issue that he heard from the people is the concern about Muslims taking Fiji as it happened in Bangladesh. This answer suggests that the intention of writing this letter was to propose to have a reconciliation in order to resolve all the ill feelings among the citizen.

52. As I mentioned above, the defence can discharge its evidential burden by adducing or pointing out some evidence, to suggest a reasonable possibility that the intention of the article is to point out issues in order to remove ill feelings among all the citizen or point out errors or defects in the government.
53. I am satisfied that the defence has pointed out the following evidence, that:
- (i) Mr. Waqabaca has given a petition to Hon. Attorney General, suggesting to have a national reconciliation to discuss and resolve issues pertaining to *i-Taukei* communities, which could create greater instability in future.
 - (ii) Mr. Waqabaca has proposed to conduct this reconciliation based on Ten Commandments.
 - (iii) The article has discussed about the issues of debt, land ownership issues which have been existing since the colonial era of 1880s.
 - (iv) The government has already taken steps to address these land issues.
 - (v) Mr. Waqabaca, in this article, has requested the Hon. Attorney General to have some consideration for indigenous people and give them an opportunity to resolve the enormous problems that could eventually lead to the extinction of the ingenious people just as the actions of Muslims in Bangladesh have led to taking over the country.
 - (vi) Mr. Waqabaca, in this article, has requested the readers to be pure at heart, resolute and considerate of all as the God's promises will be realized.
 - (vii) Mr. Waqabaca in his answer to Q68 of his caution interview has stated that he has compiled the issues that he heard from people. He suggested

in this article to have a reconciliation in order to solve all the ill feelings amongst citizens.

- (vii) Mr. Katonitabua, in his evidence admitted the issues which have been discussed in the article are the main issues of *i-Taukei* community,
- (ix) Mr. Katonitabua in his evidence admitted that this letter suggests to have a national reconciliation, which is not a bad idea, though government has no policies to carry out such a reconciliation process.

- 54. In view of the above discussed reasons, I find that there is a reasonable doubt, whether a reasonable, sensible and fair minded *i-Taukei* reader, if reads this article in its entirety, taking into consideration the context and circumstances under which this article was written, would understand this article as the manner it was alleged by the prosecution or would he understand that this article proposes to have a national reconciliation in order to resolve the issues pertaining to the *i-Taukei* communities, which could create great instability in future,
- 55. Accordingly, I find that the prosecution has failed to prove beyond reasonable doubt that this article, if taken into consideration in its entirety, says that Muslims are land grabbing monsters who rape, murder and abuse children and unless the readers of *Nai Lalukai* take actions, these Muslims monsters would take over Fiji.
- 56. I now draw my attention to determine whether this article has a tendency to create feelings of ill-will and hostility between Muslims and non-Muslim population of Fiji.
- 57. The feelings of ill-will and hostility between different classes of the population become seditious according to the circumstance and the context under which it was written or published, (*Reg v Burns and Others*). Therefore, the court has to consider the effect that this article has on the intended readership and the extent of which that effect can go. The court has to determine whether that effect can go to the extent of affecting the public order or the tranquility of the State as the purpose of this offence is to prevent the unlawful attack on the tranquility of the State (*vide State v Maa*) (*supra*).

58. An animosity, antagonism or hostility among the classes of population could have an effect to the order of the State, depending upon the nature of the classes of the population involved in such an animosity. Moreover, the social, economical, cultural, and demographic context of these classes would assist the court in order to determine the degree of the effect of such feelings of ill-will and hostility. Therefore, the court has to take into consideration all of the circumstances that was existed at the time of this article was written and published, in order to determine whether this article has the tendency to promote the feelings of ill-will and hostility between Muslims and non-Muslim population of Fiji with such an effect.
59. The prosecution only presented the evidence of Mr. Katonitabua and IP Nadolo. The evidence of Mr. Katonitabua is primarily focused on to explain his role in this matter. He is the complainant, who reported this matter to the Police. He explained about the nature of the readership of *Nai Lalakai*. Mr. Katonitabua, is the Permanent Secretary of the Ministry of *i-Taukei* affairs meets *i-Taukei* communities during the consultation processes conducted by the Ministry.
60. As concluded above, there is a reasonable doubt whether this article intends to establish a national reconciliation in order to resolve the issues pertaining to *i-Taukei* communities, which they see would create great instability in future. Moreover, at paragraph eleven of the article, it has been requested from the Hon. Attorney General to have some consideration for the indigenous people and give them an opportunity to solve their enormous problems that could eventually lead to extinction of the indigenous people, just as the actions of the Muslims in Bangladesh have led to them taking the country. In paragraph eleven of the article, it appears that Mr. Waqabaca is suggesting to Hon. Attorney General to solve the issues that could eventually lead to extinction of the indigenous people.
61. The Fiji Court of Appeal in State v. Maa [1992] FJCA 23; AAU0016u,91s (27 November 1992) held that:

*“The purpose of the offence is to prevent any unlawful attacks on the tranquility 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 in 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.”

62. Mr. Katonitabua in his evidence explained the policies of the government. He said that the government as a policy does not expect to implement this proposal of reconciliation. The government has different policies to address the issues highlighted in the article. However, Mr. Katonitabua admitted that the proposal of national reconciliation is not a bad idea and a method of way-forward though the government does not wish to implement it.
63. In view of the findings of **State v Mua (supra)** and the reasons discussed above, I find that the prosecution has failed to prove beyond reasonable doubt that this article has a tendency to promote feelings of ill-will and hostility between Muslims and non-Muslim population of Fiji.

Mr. Arts and the Fiji Times Limited

64. I now take my attention to consider whether Mr. Arts and the Fiji Times Limited by publishing and printing this seditious article have only intended to promote the feelings of ill-will and hostility between Muslims and non-Muslim populations of Fiji or the evidence could suggest other probable and possible inferences to suggest otherwise.
65. The offences that have been created under the Crimes Act consist with physical and fault elements. In order to find a person guilty for an offence, the prosecution has to prove beyond reasonable doubt the existence of both the physical and fault elements of the offence. (*vide Sections 13, 14 and 57 of the Crimes Act*).
66. The learned counsel for the prosecution and the defence both agreed that the principle expounded in Fiji Times Ltd v Attorney General of Fiji [2017] FJSC 13; CBV0005,2015 (21 April 2017) regarding the editorial responsibility has no application to this case, which I concur with them. In *Fiji Times Ltd v Attorney General of Fiji (supra)* the court has dealt with a common law offence of contempt of scandalizing the Court, where it was held that the lack of knowledge or intention is not an excuse for the editor, publisher or the printer.
67. However, for this offence, as discussed above, the prosecution has to prove beyond reasonable doubt that Mr. Arts and the Fiji Times Limited published and printed this article with the intention to promote feelings of ill-will and hostility between Muslims and non-Muslim population of Fiji.
68. There is no dispute that Mr. Arts is the Publisher of Fiji Times Limited, including *Nai Lulakai* and the Fiji Times Limited printed this edition of *Nai Lulakai*. Both the accused claim that they never saw this article before it was published and printed.
69. The prosecution only tendered the employment contract of Mr. Arts in order to prove that Mr. Arts had the necessary intention. IP Nadolo in his evidence admitted that the Police did not conduct any investigation to confirm whether Mr. Arts or Mr. Wesley has ever

came to know about this article, or had even seen or read this article before it was published and printed. The investigation was only limited to uplifting of the copy of this article and *Nai Lalakai* newspaper from the office of Fiji Times Limited and recording of caution interviews of the accused persons.

70. Mr. Arts, though he did not adduce any evidence, maintains a position that he never saw or read this article that was published. Mr. Wesley and three witnesses of the third accused in their respective evidence said that Mr. Arts normally has no influence on the editorial matters. He cannot read or speak *i-Taukei* language. IP Nadolo in his evidence said that the Police accepted the fact that Mr. Arts cannot read or speak *i-Taukei* language.
71. Moreover, the defence adduced evidence to establish that the Fiji Times Limited is very much concerned about its editorial standards and had made all possible efforts to avoid legal dispute in publishing.
72. Mr. Maharaj and Mr. Ravai in their respective evidence said that it was Mr. Ravula who entered this article to print grass system and edited it twice before it was sent for graphic and printing. Mr. Maharaj tendered a document which he obtained from the archive of print grass system, in order to establish his contention that it was Mr. Ravula who actually entered this article to the editing system.
73. Having taken into consideration all of these evidence, I do not find any evidence to establish that this article has ever gone to Mr. Arts, or Mr. Arts has ever come to know about this article before it was published in *Nai Lalakai*. Accordingly, I find that the prosecution has failed to prove beyond reasonable doubt that Mr. Arts published this article with the intention to promote the feelings of ill will and hostility between Muslims and non-Muslim population of Fiji.

Fiji Times Limited

74. In view of the above finding of the intention of Mr. Arts, I further find that the prosecution has failed to prove beyond reasonable doubt that the Fiji Times had the necessary guilty intention in printing this article in *Nai Lalakut* pursuant to Section 53 (1) (2) (a) and (b) of the Crimes Act.

Mr. Fred Wesley

75. Mr. Fred Wesley is being charged for aiding and abetting Mr. Arts to publish this seditious publication. The prosecution has to establish beyond reasonable doubt that Mr. Wesley with an intention to aid or abet Mr. Arts did not perform his contractual duty, that is to assist Mr. Arts to maintain the editorial standards and also prevent Mr. Arts in publishing seditious article.

76. The prosecution only presented the employment contract of Mr. Wesley and invited the court to consider it as a circumstantial evidence to make a positive inference that Mr. Wesley had not performed his contractual duty to assist Mr. Arts to maintain editorial standards with the intention to aid and abet Mr. Arts to commit an offence.

77. Having carefully scrutinized the contents of the said employment contract of Mr. Wesley, which was tendered as an exhibit of the Prosecution, I do not find any clause imposing such a duty on Mr. Wesley that he has to assist Mr. Arts to maintain editorial standards. However, the evidence of Mr. Wesley, confirms that the Mr. Arts relies on Mr. Wesley for editorial matters. Once again I do not find any evidence to establish that Mr. Wesley knew or was aware about this article before it was published. The evidence of Mr. Raval confirms that it was Mr. Raval who entered this article into the pon grass system and sent it for the printing.

78. Moreover, I take into consideration the last few question put to Mr. Wesley by the learned counsel for the prosecution, which I reproduce as follows:

- Q. I'm coming towards the end, Mr. Wesley. The point I've got to is where I'm going to suggest my case to you. You might not agree with it. Now, what I'm suggesting, Mr. Wesley, is this, that there is not a snowball's chance in hell, if I can put it like that, that you would have allowed a letter to be published in Nai Lalakai without knowing what it said. You simply wouldn't have allowed it?*
- A. If I did not know what it said, yes, your Lordship.*
- Q. You're agreeing with me?*
- A. You asked me, your Lordship, whether I would allow a letter to run if I did not know what it said?*
- Q. Yes.*
- A. Yes, I wouldn't allow it.*
- Q. So, you agree with me and the obvious reasons are it's simply too risky, for the reasons you've told us about, isn't it?*
- A. Your Lordship, I've said this a couple of times, your Lordship. Before I agree on a letter that needs to run, I will either, if it was with the Nai Lalakai I would expect the translation, then I would refer it up to the lawyers, your Lordship, before I would ever run the letter.*
- Q. You see, Mr. Wesley, what I am suggesting to you is that you did know very well the content of the letter published in the Nai Lalakai on the 27th of April 2016 before it was published?*
- A. No, your Lordship.*
- Q. And what I'm suggesting is that you've been largely truthful in your evidence but on this specific issue, with your knowledge, you are not telling the truth to this Court?*
- A. I am telling the truth, your Lordship.*
- Q. The reason you're not telling the truth is because you want to cover it up because you know very well that you made a mistake to allow that to be published?*
- A. Your Lordship, I have no knowledge of the letter, your Lordship.*
- Q. Thank you, Mr. Wesley, I have no further questions.*

79. By putting the prosecution case to Mr. Wesley, the learned counsel for the prosecution suggested to Mr. Wesley that he made a mistake by letting this article to be published and now he is trying to cover it up. In view of the case of the prosecution that was put to Mr. Wesley during the cross examination, it suggests that Mr. Wesley knew the letter but mistakenly let it to be published in *Nai Lalakal*.
80. I am mindful of the facts, that questions of the counsel are not evidence. However, it would assist the court to understand the case of the prosecution. The learned counsel for the prosecution started this part of his cross examination stating that he was going to suggest Mr. Wesley the case of the prosecution for him to make his comments.
81. Be that as it may, there is no evidence adduced by the prosecution to prove that Mr. Wesley had an intention to aid and abet Mr. Arts to publish this article, apart from the employment contract. I accordingly find the prosecution has failed to prove beyond reasonable doubt that Mr. Wesley with the intention to aid and abet Mr. Arts to publish this article, did not perform his contractual duties as stated in the information.

Mr. Anare Ravula

82. Mr. Anare Ravula is being charged for aiding and abetting Mr. Arts to publish this seditious publication. The prosecution has to establish beyond reasonable doubt that Mr. Ravula with an intention to aide or abet Mr. Arts did not perform his contractual duty, that is to assist Mr. Arts to maintain the editorial standards and also prevent Mr. Arts in publishing seditious article.
83. The prosecution only presented the employment contract of Mr. Ravula and invited the court to consider it as a circumstantial evidence to make a positive inference that Mr. Ravula had not performed his contractual duty to assist Mr. Arts to maintain editorial standards with the intention to aid and abet Mr. Arts to commit an offence.

84. Having carefully scrutinized the contents of the said employment contract of Mr. Ravula, which was tendered as an exhibit of the Prosecution, I do not find any clause imposing such a duty on Mr. Ravula that he has to assist Mr. Arts to maintain editorial standards.
85. However, the evidence of Mr. Ravai and Mr. Maharaj who gave evidence for the third accused, confirm that it was Mr. Ravula who actually received, approved and entered this article into pon grass system. He has then edited this article twice before it was gone for print. All these evidence came from the third accused, implicating Mr. Ravula and not from the Prosecution. However, as discussed above, the prosecution has failed to prove beyond reasonable doubt that this article is seditious on the ground that it has a tendency to promote feelings of ill-will and hostility between Muslims and non-Muslim population of Fiji.
86. In view of these reasons discuss above, I do not find any cogent reasons to disregard the unanimous opinion of not guilty given by the three assessors.
87. I accordingly find that the prosecution has failed to prove beyond reasonable doubt that each of these accused is guilty for the offence which they have been charged in the information respectively.
88. In conclusion, I hold that:
- i) Mr. Josaja Waqabaca is not guilty for the offence of Sedition as charged and acquit him from the same accordingly,
 - ii) Mr. Anare Ravula is not guilty for the offence of aiding and abetting to sedition as charged and acquit him from the same accordingly,
 - iii) Mr Fred Wesley is not guilty for the offence of aiding and abetting to sedition as charged and acquit him from the same accordingly,
 - iv) Mr. Hank Arts is not guilty for the offence of Sedition as charged and acquit him from the same accordingly.

- v) The Fiji Times Limited is not guilty for the offence of Sedition as charged and acquit it from the same accordingly.

89. Thirty days (30) to appeal to the Fiji Court of Appeal.




R.D.R.T. Rajasinghe
Judge

At Suva
22nd May 2018

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