DIRECTOR OF PUBLIC PROSECUTIONS v ANARE PAPU WAQAVONOVONO and 3 Ors

HIGH COURT — APPELLATE JURISDICTION

SINGH J

9, 21 August 2002

[2002] FJHC 150

Criminal law — Conspiracy to Commit a Felony — appeal against acquittal — agreement between respondents — common design — doctrine of overt acts — Criminal Procedure Code Cap 21 s 169(2) — Minor Offences Act Cap 18 s 7(2) — Penal Code Cap 17 ss 251, 385.

Evidence — corroboration — credibility of witnesses — material prosecution evidence came from two accomplices.

Respondents were acquitted by the Suva Magistrate's Court of the offense of Conspiracy to Commit a Felony. The State sought an appeal against the acquittal of respondents alleging that the learned Magistrate erred in not considering the evidence of the prosecution witnesses.

Held — (1) On the facts and overt acts, the 2nd Respondent was clearly implicated. As far as the 1st respondent is concerned, three things stand out and merit consideration. First, there is close relationship between the 1st and 2nd Respondents and therefore ability of these two together to plot secretly and inviting others to join later. Second, the occurrence of grog drinking session at the home of 1st Respondent and which was also home of 2nd Respondent at the material time and presence of Prosecution Witness 3 Koroi Laubili there. Third, the 1st Respondent's vehicle was used by the 2nd Respondent to visit Tailevu on two occasions.

(2) The learned Magistrate despite the concessions made by the prosecution and evidence that these two were accomplices failed to direct himself about the need for corroboration in such circumstances. These two were the key prosecution witnesses. Their evidence was vital to the success of prosecution case. Since both were accomplices and both witnesses for the prosecution, the evidence of one could not corroborate the evidence of the other.

Appeal dismissed.

Cases referred to

Director of Public Prosecutions v Hester [1973] AC 296; [1972] 3 All ER 1056; *Director of Public Prosecutions v Kilbourne* [1973] AC 729; [1973] 1 All ER 440; [1973] 2 WLR 254; *Josevata Bolatakeu v Reginam* [1978] FJSC 149; Criminal Appeal No 123 of 1977; *Narendra Prasad v Reginam* [1979] FJCA 17[1979] 25 FLR 221 (25 July 1979); *R v Aspinall* (1878) 2 QBD 48; *Reg v Murphy and Douglas* 8 C & P 297,1837, cited.

V. Vosarogo for the Appellant

T. Fa for the Respondent

Judgment

Singh J. The Respondents were acquitted by the Suva Magistrate's Court of the offence of Conspiracy to Commit a Felony contrary to ss 385 and 251 of the Penal Code, Cap 17.

Particulars of Offence

Anare Papu Waqavonovono and and Josaia Luvuewai Moala Waqabaca between the 28th day of December 2001 and the 1st day of January 2002 at Suva in the Central Division, conspired together and with others unknown to commit a felony, namely abduction of certain persons with intent to cause the same to be secretly and wrongfully confined.

The State is appealing against the acquittal of the Respondents by the learned Magistrate. The grounds of appeal are as follows:

(a) The learned Magistrate erred in law and in fact in failing to consider the evidence of the existence of the agreement between the two Respondents.

(b) The learned Magistrate erred in fact in failing to give appropriate or any weight at all to the evidence of Prosecution Witness No 3.

(c) The learned Magistrate erred in law and in fact when he failed to give due and appropriate weight to the evidence of Prosecution Witness No 1 and Prosecution Witness No 3 with respect to the issue of common design and purpose.

(d) The learned Magistrate erred in law and in fact in holding that the offence of conspiracy had not been proved by the evidence of the State.

(e) The learned Magistrate erred in fact when he failed to consider the contradictory nature of 1st Respondent's evidence and the evidence of Defence Witness 3 and therefore the considerably lesser weight that he could confer on the latter's evidence.

That the State reserves the right to argue additional grounds of appeal upon receipt of the court record.

Background

Initially, the two Respondents were charged with two other named persons for this offence. Charges against the other two were withdrawn. They testified on behalf of the State. They were PW1 Varinava Tiko and PW3 Koroi Laubili.

The prosecution alleged that on 28th December 2001 the 2nd Respondent after prior arrangement brought PW3 Koroi Laubili to the residence of 1st respondent. During a grog drinking session, the 1st respondent asked this witness for guns so he could take the government by force and hold Laisenia Qarase, Qoriniasi Bale and Frank Bainimarama as hostages and to obtain release of prisoners from Nukulau. This witness promised the 1st Respondent that he would look for guns. The next day about 9 am both the Respondents came to him. The 1st Respondent asked him about the promise the night before.

On 31st December 2001 the 2nd Respondent and the witness travelled to Tailevu to the residence of PW1 Varinava Tiko in search of guns and ammunitions. They travelled in 1st Respondent's vehicle.

On 1st January 2002 these two again travelled to Tailevu in 1st Respondent's vehicle to get guns from PW1 Varinava Tiko.

Varinava Tiko it appears was unhappy with the plan so he alerted the police who arrested the two.

Even though the grounds of appeal are listed separately, there was considerable overlap and repetition when the Appellant argued its appeal. The Appellant submitted that the offence of conspiracy is complete once an agreement is reached. It is not necessary for the offenders to be together at the same time and the same place. The Court the Appellant submitted must look to see if there was a common design and a common purpose.

The Appellant submitted that the learned Magistrate found the evidence given by PW1 Varinava Tiko as credible but having found that he did not give it due weight and ignored parts of his testimony. The Appellant further submitted that the learned Magistrate did not say why he did not believe the evidence of PW3 Koroi Laubili. Taken together the evidence of these two witnesses pointed to a conspiracy.

Mr Fa for the Respondents submitted that the evidence of PW1 Varinava Tiko and PW3 Koroi Laubili was suspect because they were accomplices. He submitted that the learned Magistrate correctly analysed the evidence and divided it into three separate meetings of parties. He submitted the meeting off 28th December 2001 formed the basis of the prosecution case. The 2nd Respondent was not present at the meeting on the mentioned time. The 1st Accused denied discussions about obtaining weapons. He also produced a witness who was present at the grog drinking session. He too did not hear any discussions about the obtaining of guns and capture of the three eminent persons

In his judgment the learned Magistrate looked at the ingredients of conspiracy. He said on p 2 of the judgment—

> "The word "conspiracy", as such, is not defined in the Penal Code." In Josevata Bolatakeu v. Reginam — Criminal Appeal No. 123 of 1977, then Chief Justice Sir Clifford Grant said the following,
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> *… the essential ingredient of conspiracy is one common design. To quote Brett, J in R v Aspinall* (1876) 2 OPD 48 *at 58" "… the crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do, at once or at some future time, certain things. It is not necessary in order to complete the offence that any one thing should be done beyond the agreement. The conspirators may repent and stop, or may have no opportunity, or may be prevented, or may fail. Nevertheless the crime is complete; it was completed when they agreed.*

The prosecution therefore could have proved its case if it could show beyond reasonable doubt that the parties at a grog session held on 28th December 2001 at 1st Respondent's house had agreed to obtain guns as a means to kidnap the Prime Minister Laisenia Qarase, the Attorney-General Qoriniasi Bale and the Commander of Fiji Military Forces Frank Bainimarama.

PW14 Detective Sergeant 1476 Isikeli Raisulu was the investigating officer. According to him the grog session on 28th December 2001 was important in establishing a common design. The grog session he said was a cover up. He said, "my case stands or falls on whether or not Koroi's evidence is accepted".

The learned Magistrate after looking at the evidence of three separate meetings concluded that at neither of those meetings "both accuseds, were present together at the material time to agree to the alleged unlawful objective".

On the evidence adduced the learned Magistrate was correct in coming to that conclusion because PW3 Koroi Laubili had said that the 2nd respondent was not present when the 1st respondent told him of the plan to kidnap the three persons. His evidence was that the 2nd respondent brought him to 1st respondent's house and then left after five minutes. The plot to kidnap was revealed to him after the 2nd Respondent had left.

Having found no evidence of agreement between the two respondents, the learned Magistrate looked at the evidence from the point of view of the doctrine of overt acts. He referred to a passage from Josevata Bolatakeu as follows:

> *In the absence of direct evidence a conspiracy can be inferred from the conduct of parties alleged to have conspired, from their subsequent overt acts, and from other*

relevant circumstantial evidence incompatible with their innocence and incapable of explanation upon any other reasonable hypothesis than that of their guilt.

The Fiji Court of Appeal in *Narendra Prasad v Reginam* (1979) 25 FLR 231 at 224 expressed the issue more clearly as follows:

A conspiracy is often proved by proving acts on the part of the accused persons which lead to the inference that they were acting in concert in pursuance of an agreement to do an unlawful act. Frequently the implementing action is itself the only evidence of the conspiracy and this has been referred to in numerous cases as the doctrine of overt acts. In Reg v Murphy 1837 C & P Coleridge J said at page 311. 'It is not necessary that it should be proved that these defendants met to concoct this scheme, nor is it necessary that they should have originated it'.

It concluded—

If the conclusion to be drawn from the overt acts proved against the appellant and the other accused was that there was a conspiracy, then a charge of conspiracy will lie notwithstanding the lack of evidence of a formal agreement between the appellant and the other accused person concluding such a conspiracy. Where and when the conspiracy originated is often unknown and seldom relevant as conspiracy is often proved by overt acts from which an antecedent conspiracy is to be inferred.

The doctrine of overt acts requires a certain approach to be taken in considering a case of conspiracy. The approach suggested is to look at undisputed facts, facts as found by the trial court and the overt acts and consider whether they lead the court to conclude that the only possible hypothesis for these overt acts was that there was a conspiracy. Mere strong suspicion that the parties were acting in concert is not enough to found guilt.

The undisputed facts and overt acts in the case may be summed up as follows:

1. that the 2nd Respondent at the material time lived with 1st Respondent at 1st Respondent's residence at Tacirua;
2. He had moved in with the 1st Respondent after he had problems with his family.
3. He had access to 1st Respondent's vehicle registration CQ 057.
4. The 2nd Respondent brought PW3 Koroi Laubili to 1st Respondent's residence to drink grog on 28th December 2001 and then dropped him home in 1st Respondent's vehicle.
5. That the 1st Respondent did not know Koroi Laubili before this date.
6. The next day the 2nd Respondent went to PW3's house with the 1st Respondent in 1st respondent's vehicle.
7. That on 31st December 2001 the 2nd Respondent and PW3 Koroi Laubili visited PW1 Varinava Tiko in Tailevu and discussed about guns.
8. On 1st January 2002, the two again visited PW1 Varinava Tiko to get guns as pre-arranged.
9. Both these journeys were made in 1st Respondent's vehicle.

On the facts and overt acts, the 2nd Respondent was clearly implicated. As far as the 1st Respondent is concerned, three things stand out and merit consideration. First there is close relationship between the 1st and 2nd Respondent and therefore ability of these two together to plot secretly and inviting others to join later. Secondly, the occurrence of grog drinking session at the home of 1st Respondent and which was also home of 2nd Respondent at the material time and presence of PW3 Koroi Laubili there. Thirdly, the 1st Respondent's vehicle was used by the 2nd Respondent to visit Tailevu on two occasions.

The 1st Respondent had been interviewed at great length by the police and he had denied any involvement. In his interview notes he explained that he came from the same village as the Prime Minister Laisenia Qarase, that they were cousins and that he had a good relationship with the Prime Minister. He explained that the 2nd Respondent usually used his vehicle and the 2nd Respondent did not inform him of the purpose or destination. He denied when questioned by police any knowledge of his vehicle being used by the 2nd Respondent to travel to Tailevu to secure arms or having any connection with anyone to abduct or confine the three persons. He had admitted to the police that PW3 Koroi Laubili was brought to his home by the 2nd Respondent on 28th August 2001 and they drank grog together. However, he denied that there was any talk of abducting certain persons.

The learned Magistrate said

> *I accept accused number one's denial of the allegations in his police caution interview statement and I also accept his sworn denial in the court room.*

During the course of interview PW3 Koroi Laubili and the 1st respondent were confronted and there too the 1st respondent had denied allegations by PW3 Koroi Laubili.

The issue really was one of credibility whether to believe the 1st Respondent or PW3 Koroi Laubili. The trial Magistrate had heard the witnesses and the advantage of having seen them testify and accepted the evidence of the 1st Respondent. He was in a superior position to decide on issues of credibility compared to an appellate court which is at a distinct disadvantage as it did not have the benefit of seeing and hearing the witnesses. The appellate court would need to be shown some very compelling reasons before it would venture to differ from the findings of a trial court on issues of credibility.

The evidence of the 1st Respondent and PW3 Koroi Laubili conflicted on the issue of discussions at the grog meeting of 28th December 2001. If the learned Magistrate believed the 1st Respondent, then that portion of PW3 Koroi Laubili's evidence could not have been believed by the learned Magistrate. The overt acts of 2nd Respondent become his independent acts and have no nexus with the 1st Respondent.

The prosecution in its submissions had made the concession that both PW1 Varinava Tiko and PW3 Koroi Laubili were accomplices but nevertheless are both credible witnesses. The learned Magistrate agreed with that in respect of PW1 Varinava Tiko only. He looked at the evidence of this witness quite closely and came to that conclusion.

The learned Magistrate, despite the concessions made by the prosecution and evidence that these two were accomplices failed to direct himself about the need for corroboration in such circumstances. These two were the key prosecution witnesses. Their evidence was vital to the success of prosecution case. Since both were accomplices and both witnesses for the prosecution, the evidence of one could not corroborate the evidence of the other.

In *DPP v Hester* 1973 AC 296 and *DPP v Kilbourne* 1973 AC 729 the House of Lords clarified the law on certain aspects of corroboration. Their Lordships suggested that with the exception of accomplices who are participis criminis, there is no general rule that witnesses who require corroboration cannot corroborate one another. They ruled that accomplices who participate in the same crime could not corroborate one another because of the danger that they may have concocted a false story together.

The learned Magistrate did not direct himself on the dangers of convicting a person on the basis of uncorroborated evidence of an accomplice. Had he done so the prosecution case would have been further weakened and definitely not strengthened. All that he said of evidence of PW3 Koroi Laubili is—

> *PW3 was originally charged with Accused No 1 and 2 on this matter. On oath, PW3 said he was discharged from the case, to become a State witness. The authority to do so, was given by the learned Director of Public Prosecutions.*

I have carefully gone over the trial Magistrate's judgment, the nature of the evidence and in particular noted that the material prosecution evidence came from two accomplices, the nature of evidence for the defence. I am not convinced that the learned Magistrate erred in holding that the prosecution had failed to prove that the charge of conspiracy beyond reasonable doubt. The appeal is dismissed.

There is one other matter which the Court would attempt to comment upon. The 2nd Respondent was unrepresented in the Magistrate's Court. The learned Magistrate convicted him of the lesser charge of Using Threatening Language in a public place contrary to ss 7(2) of the Minor Offences Act, Cap 18. This offence the learned Magistrate said was committed when he revealed his plan on a Tailevu farm to PW1.

No doubt the learned Magistrate had the powers to do this by virtue of the provisions of s 169(2) of the Criminal Procedure Code, Cap 21 (CPD) which reads—

> *When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.*

For an offence to be committed under the provisions of s 7(2) of Minor Offences Act, the threatening words must be uttered in a public place. Public place is defined in s 2 of the Minor Offences Act as—

> *(a) any highway public street, public road, public park or garden, sea beach, river, public bridge, wharf, jetty, lane, footway, square, court, alley or passage whether a thoroughfare or not; or*
>
> *(b) any*
>
> *(i) land or open space, whether such land or space is closed or unenclosed; and*
>
> *(ii) place or building of public resort, other than a dwelling house*
>
> *to which for the time being the public have or are permitted to have access whether on payment or otherwise.*

The words were uttered on a farm. There was no evidence led to show that the public had access to this farm. Accordingly, one could not say that the farm was a public place. One of the essential ingredients of the offence was lacking. For this reason the conviction of the 2nd Respondent for Using Threatening Language in a public place cannot stand. The conviction is quashed and the 2nd Respondent acquitted. The significance of this is purely academic for the 2nd Respondent as he has already served his sentence.

Appeal dismissed.