STATE v RATU INOKE TAKIVEIKATA (HAC005 of 2004S)

HIGH COURT — CRIMINAL JURISDICTION

GATES J

21, 22 July 2004

Practice and procedure — application to postpone trial due to unavailability of Accused's counsel of choice — Accused allowed over 7 weeks to brief alternative counsel due to counsel's unavailability — appropriate criteria for court to consider right to counsel of choice — gravity and importance of offences charged against Accused — Constitution of the Republic of Fiji ss 3(a), 3(b), 21(2), 21(4), 28(1)(d), 29(1) — International Bill of Human Rights of the International Covenant on Civil and Political Rights Art 14(3).

The Accused faced the very serious charges of four counts of incitement to mutiny, one count of conspiring to incite mutiny, and one count of aiding soldiers in an act of mutiny. On 4 June 2004, the case was fixed for trial to commence on 27 July 2004 which allowed a period of over 7 weeks for the Accused to brief alternative counsel, as his original choice of counsel was unavailable for that date.

Thereafter, the Accused sought a stay in the Court of Appeal to allow him to have his trial in October 2004 when his counsel from overseas would be available. The Court of Appeal gave its decision and concluded that it did not have jurisdiction to entertain the interlocutory appeal and dismissed the appeal. The court went on to indicate that it would have looked favourably on such an application to allow defence counsel's dates for the trial, and that the State would be at risk in pursuing the earlier date.

On 19 July 2004 the matter came back before the High Court but no counsel appeared for the Accused. The Accused likewise reiterated his wish to have his trial in October as his overseas counsel would be available then. Thus, the court vacated the 27 July 2004 date as the trial date.

The question for determination in this case was what appropriate criteria the court should consider in relation to the right to counsel of choice.

Held — The Accused was facing very serious charges as the offences could have led to the dislocation of the RFMF an institution charged with the security of the State, the defence of Fiji and the maintenance of order. Thus, the trial was important not only for the Accused but for Fiji as well. And because of such gravity and importance, the Accused must be represented by a counsel and tips the balance in favour of the Accused as against the rights of other Accused awaiting their trial. The trial should commence on 13 October 2004 with the Accused counsel of choice.

Application granted.

Cases referred to

Conroy v Conro (1917) 17 SR (NSW) 680; *Dietrich v R* (1992) 177 CLR 292; 109 ALR 385; *Dunkley v R* [1995] 1 AC 419; [1995] 1 All ER 279; *Edwards v Attorney-General* [1930] AC 124; [1930] 1 DLR 98; *Galos Hired v R* [1944] AC 149; *Greer v R* (1992) 62 A Crim R 442; *Sali v SPC Ltd* (1993) 116 ALR 625; *R v Kingston* (1948) 32 Cr App Rep 183; *M'Culloch v State of Maryland* (1819) 17 US 316; 4 Wheat 316; *McInnis v R* (1979) 143 CLR 575; 27 ALR 449; *Minister of Home Affairs v Fisher* [1980] AC 319; [1979] 3 All ER 21; *Ratu Inoke Takiveikata v State* [2004] FJCA 39; *R v Grondkowski* [1946] 1 KB 369; [1946] 1 All ER 559, cited.

Hunter v Southam Inc (1984) 11 DLR (4th) 641; *Moss v Brown* [1979] 1 NSWLR 114; *R v Cox* [1960] VR 665; *Squire v Rogers* (1979) 27 ALR 330; *State v Ratu Jope Seniloli* [2004] FJHC 4, considered.

Applicant in person

G. H. Allan for the State

[1] **Gates J.** This case was fixed for trial to commence on 27 July 2004. That fixture was ordered on 4 June 2004, which allowed a period of just over 7 weeks for the Accused to brief alternative counsel, his original choice of counsel being unavailable for that date.

[2] Meanwhile the Accused sought a stay in the Court of Appeal so as to allow him to have his trial in October 2004, when his counsel from overseas would be available. The Court of Appeal gave its decision in *Ratu Inoke Takiveikata v State* [2004] FJCA 39 (*Takiveikata*).

[3] The court concluded it did not have jurisdiction to entertain the interlocutory appeal and dismissed the appeal. But that was not the end of the matter. The court went on to indicate that it would have looked favourably on such an application to allow defence counsel's dates for the trial, and that the State would be at risk in pursuing the earlier date.

[4] The matter came back before the High Court on 19 July 2004. On that day no counsel appeared for the Accused. I asked and received confirmation from the Accused himself that he still wished to have his trial in October and that his overseas counsel, Mr Stanton, was available then. Mr Allan did not wish to maintain argument for 27 July 2004 as the commencement date. Accordingly I vacated the 27 July 2004 date as the trial date.

[5] Before arriving at the postponement date, a new date for trial, I called for submissions on the factors to be considered by a court in fixing trial dates or in allowing postponements, as matters of case management. Those submissions I have now received. What are the appropriate criteria for a court to consider vis-a-vis the right to counsel of choice?

Constitutional safeguards

[6] Under the Constitution (s 28(1)(d)) every person charged with an offence has the right:

> (d) to defend himself or herself in person or to be represented, at his or her own expense, by a legal practitioner of his or her choice or, if the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid;

The right is set out more fully in the International Bill of Human Rights of the International Covenant on Civil and Political Rights (ICCPR) where Art 14(3) provides:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> …
>
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> …
>
> (d) … to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
>
> …

[7] The courts will try to see that an accused is able to brief and to be defended by counsel of his or her own choice. But it is well-accepted that this is not an absolute right: *Dunkley v R* [1995] 1 AC 419 at 427; [1995] 1 All ER 279. On this aspect the Court of Appeal in *Takiveikata* (at 8) commented:

> We accept also that there is ample authority to the effect that the right to counsel of choice is a right which is not unrestricted but must be exercised reasonably having regard to the circumstances and bearing in mind the comments contained in the Canadian case of *Hunter v Southam Inc* (1984) 11 DLR (4th) 641 which emphasizes the unremitting protection of individual rights enshrined in the Constitution.

[8] The right to counsel of choice is part of the concept of fair trial also enshrined as a right in the Constitution (s 29(1)) *Dietrich v R* (1992) 177 CLR 292; 109 ALR 385. If a step in the proceedings effectively and unreasonably denies the accused person's right to counsel of choice it could cause the ensuing trial to miscarry. This would lead to much wastage of time and resources to all concerned. The matter of listing therefore has to be approached with some care, if not precision.

Construing the constitutional provisions

[9] The Court of Appeal in *Takiveikata* referred to the Canadian Supreme Court case of *Hunter v Southam Inc* (1984) 11 DLR (4th) 641 (*Hunter*). Dickson J delivering judgment for the court said (at 650):

> I begin with the obvious. The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines.

[10] Fiji's Constitution does not, in according to an accused person the right to counsel of choice, specifically limit that right to one that is to be judged against a touchstone of reasonableness. Often the rights in the (Ch 4) in the Bill of Rights from which derogation is permitted are made subject to the phrase, "but only to the extent that the limitation is reasonable and justifiable in a free and democratic society". For instance, for searches to be lawful, they must be reasonable. The right to personal privacy and the right to privacy of personal communication may be made subject to limitations, but only to such as are "reasonable and justifiable in a free and democratic society": s 37(2).

[11] In *Hunter*, with regard to the search provisions, it was said that there was no specificity in the section beyond the bare guarantee of freedom from unreasonable search. There was no "particular historical, political or philosophic context capable of providing an obvious gloss on the meaning of the guarantee": at 649.

[12] It is obvious that throughout Fiji's Bill of Rights the threads of reasonableness, practicality, and the interests of justice intertwine. Much authority favours a broad perspective in approaching constitutional interpretation: Re s 34 of the BNA Act; *Edwards v Attorney-General (Canada)* [1930] AC 124 at 136–7; [1930] 1 DLR 98 at 106–7: "to give it a large and liberal interpretation".

[13] Dickson J summarised that jurisprudence: (*Hunter* at 650):

> More recently, in *Minister of Home Affairs v Fisher* [1980] AC 319 at 329; [1979] 3 All ER 21 at 26, dealing with the Bermudian Constitution, Lord Wilberforce reiterated that a constitution is a document "*sui generis*, calling for principles of interpretation of its own, suitable to its character", and that as such, a constitution incorporating a *Bill of Rights* calls for [at p 328]: "a generous interpretation avoiding

> what has been called 'the austerity of tabulated legalism' suitable to give to individuals the full measure of the fundamental rights and freedoms referred to". Such a broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects, is also consonant with the classical principles of American constitutional construction enunciated by Chief Justice Marshall in *M'Culloch v State of Maryland* (1819) 17 US 316; 4 Wheat 316.

[14] His lordship referred to the capacity for growth and development of a Constitution. He said (at 649):

> It is clear that the meaning of "unreasonable" cannot be determined by recourse to a dictionary, nor for that matter, by reference to the rules of statutory construction. The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one".

[15] Our own Constitution admonishes the courts to prefer a construction that would promote the purpose or object of the Constitutional section or provision (s 3(a)) and to have regard to its context, to social and cultural developments, including developments in human rights, towards understanding, content, and promotion of the same (s 3(b)).

[16] Lastly the Constitution, and the rights and freedoms under it, are to apply according to their tenor "and are subject only to the limitations under laws of general application permitted by this Ch (4) and to such derogations as are authorised under Ch 14 (Emergency Powers)" s 21(2). Though it concerns the application of the Constitution to other legislation, s 21(4) gives an indication that interpretation is not to be an exercise unrelated to "the content and consequences of the legislation, including its impact upon individuals, groups, or communities".

[17] From all of these matters it can be deducted that the rights given under the Bill of Rights in the supreme law are not lightly to be suppressed or eroded. But the right to counsel of choice cannot be an absolute right. Rather it is one to be balanced with the interests of justice: *R v Grondkowski* [1946] 1 KB 369 at 372; [1946] 1 All ER 559; "the overall requirements of justice" *Conroy v Conro* (1917) 17 SR (NSW) 680 at 682. For the concept of the interests of justice carries with it the notion of practicality, reasonableness, and regard for the rights of others, including the rights of other litigants and participants in the case in question or in the case lists awaiting their trials. Some want advancement of their cases so as to have their matters soon concluded and to have anxiety thereby removed from their lives. Others want to put off the evil day, the day of their trial and instead prefer to delay matters.

The criteria

[18] Some cases will receive priority listing. It is not easy to be definitive of the categories which appropriately should receive such listing. A court will usually try to list a case relating to events going back 4 years ahead of one going back

only 1 year. More serious allegations will receive priority over lesser matters. Priority will be given to accused who are in custody or whose cases have been subject to delay or who are to be retried. In some cases, there are witnesses who are dangerously ill and their evidence must be heard before it is too late. An allegation against a professional person of dishonesty, or involving a slur upon a person of previously unblemished character will often suggest themselves for a swifter resolution. Some allegations may be of grave consequence to the accused and of similar concern to the community generally.

[19] The longer the estimate of the anticipated trial the more difficult it is to give an early date. A shorter case can often be fitted in or brought forward when another case has to be postponed, is withdrawn by the prosecution, concludes earlier than expected, or turns into a plea of guilty. Even this case achieved an advanced listing when another case turned into a plea, there having been complaints voiced by the Accused to the press of delay in the listing of his trial.

[20] Cases are usually listed back to back, that is, one trial is listed immediately after another trial. Representation of the accused, legal aid constraints, availability of counsel, whether from overseas or Fiji, and considerations of the accused, prosecuting counsel, witnesses whether local, overseas, expert or professional, the judge's diary, and special security arrangements as in this case involving deployments of police personnel all have to be resolved to arrive at a firm date of trial. A trial date is not always particularly convenient or suitable for all participants. For instance, while refixing this trial for commencement in October, another trial will have to be dislodged and put off to next year and a second trial may have to be put back further. The defence counsel, in the trial to be dislodged, had had to put off two part-heard matters for which a week each had been allocated at the time of fixing the trial date. Giving priority to one accused can sometimes disrupt several other trials, leading to the incommoding of the participants in those trials thus disrupted, and to the dislocation of their rights and expectations. This gives rise to understandable irritation and frustration with the litigation process.

[21] In *Squire v Rogers* (1979) 27 ALR 330 Deane J (at 337) said the judicial discretion in this regard:

> may involve the assessment of competing claims by litigants in other cases awaiting hearing in the list of the particular judge or the particular court and may require knowledge of the working of the listing system of the particular court or judge and the importance in the proper working of that system of adherence to dates fixed for hearing.

[22] Professional, expert or specially significant witnesses may have blocked off a week to be available for a trial set for a particular date. Once that date is changed, not only is the witness frustrated, the witness may not easily be available again. Some cases in Fiji have floundered because some members of our population are mobile for employment reasons. Witnesses from time to time serve in Kosovo, Sinai, Lebanon, and now Iraq. Nearly 2000 of Fiji's citizens have joined the British Army and have gone overseas. Others attend training attachments and courses in Australia, New Zealand, and elsewhere and may be away several months at a time. These events all add to the problems encountered in the listing and management of cases and can contribute to delay in the disposal of cases.

[23] What is to happen if many accused persons choose the same busy Mr X as their counsel? Is the court to be at the mercy of Mr X's diary? And how much more difficult will it be if that counsel is to represent only one in a case involving

several accused? How will the court manage to pin everyone down to a firm (and early) date of trial? What happens to the requests of the other litigants, or to that of the prosecutor, representing the state and the community at large, who wants an early trial date and for the matter to be concluded?

[24] To extend fairness to every accused in such a situation will not be easy, indeed not everyone may be catered for ideally. For to do so, may result in a decision that is impracticable, unreasonable, and one which may bring about over-much delay thus imperiling the rights of other litigants in the list. Trial listing then must be brought about after a careful balancing of the competing interests of the accused so as to arrive at a fair decision for all: *State v Ratu Jope Seniloli* [2004] FJHC 4, Ruling 10 June 2004. For freedom of speech is not achieved by letting everyone speak at once. Others must remain silent to allow each in turn to speak and to be heard. In *Moss v Brown* [1979] 1 NSWLR 114 at 126 the New South Wales Court of Appeal said:

> In any discussion of fairness, it is imperative to consider the position of all parties. It is sometimes forgotten that the Crown has rights and, as it has a heavy responsibility in respect of the invoking and enforcement of the criminal law, which includes seeing that the public revenue is not imposed upon, it is entitled to maintain those rights, even if they may bear heavily upon some accused.

[25] The Court of Appeal was aware of further potential difficulty. It said (*Takiveikata* at 8):

> We express the view that no court would be prepared to entertain an application of this kind in circumstances which suggested that an applicant was behaving unreasonably, including attempting to postpone a hearing, to avoid trial, or to act in some manner which was likely to be disruptive to the administration of justice generally. In other words the interests of justice also fall to be considered.

[26] A court must be on its guard against manipulation. For instance, an accused unwilling to come to trial or one who seeks to derail a trial, could keep chopping and changing his counsel. This was done (to no avail) in *Greer v R* (1992) 62 A Crim R 442 and *Sali v SPC Ltd* (1993) 116 ALR 625. Sometimes an accused claims incapacity from illness falsely, or resorts to the silly tactical games that trial advocates have often referred to as "playing ducks and drakes", thus deliberately causing delay. In *R v Cox* [1960] VR 665 (*Cox*) the Full Court of the Supreme Court of Victoria said of the exercise of the court's inherent power to adjourn or not to adjourn in such cases (at 667):

> The judge in exercising his discretion is not confined to regarding the interests of the accused. He is entitled to regard the interests of justice which may well be a very different matter. In this case, these include such matters as the opportunities which the applicant had since committal of engaging counsel, the fact that he had not engaged counsel, the state of the court list, the inconvenience and expense which would or might be caused to others by granting the adjournment, whether it was desirable or convenient that the applicant's case should be adjourned and that of his co-accused proceed alone and whether he was of opinion that the application was really made for the reason advanced. A judge is not so naïve as not to know of the manoeuvring that sometimes goes on to avoid a trial before one judge in order to get a trial before another who is supposed to be more favourable for the accused, and he may well be critical of applications for adjournments.

Conclusion

[27] The Accused here is facing very serious charges. The information contains 4 counts of incitement to mutiny, one of conspiring to incite mutiny, and one of aiding soldiers in an act of mutiny. The offences relate to events that could have led to the dislocation of the RFMF, the institution charged with the security of the State, the defence of Fiji and the maintenance of order. For the Accused as well as for the country this trial is important. It fits into the category requiring priority.

[28] But because of that gravity and importance it is doubly compelling that the Accused should be represented: see the passionate arguments for representation in the dissenting judgment of Murphy J in *McInnis v R* (1979) 143 CLR 575 at 590; 27 ALR 449 at 461 et seq; *R v Kingston* (1948) 32 Cr App Rep 183; *Galos Hired v R* [1944] AC 149. The Accused is not seeking funds from the state for his defence, but says his counsel is only available in October. If the trial were to have been fixed back in March 2004, I am not sure a court, bearing in mind all that I have said, would have been prepared to delay a trial from March to October in order to accord to the Accused the right to counsel of choice.

[29] As can be seen, to accord the right at this stage, causes disruption to the court list and inconvenience to other litigants and participants in this and other trials. But it is that gravity which I have referred to which tips the balance in the Accused's favour, as against the rights of other Accused awaiting their trials. Were this matter not so grave and of such consequence it might not have required such treatment. After all, 7 weeks gave sufficient time to brief alternative counsel. If this application had failed, the resulting predicament for the Accused might have been what the court in *Cox* (at 668) considered "resulted, from dilatoriness and inaction on the applicant's part or on the part of those acting for him".

[30] Accordingly the trial will now commence on 13 October 2004 at 9.30 am with Mr Stanton as the Accused's counsel. The pre-trial conference will be held as previously indicated on a date to suit Mr Stanton, of which the Accused will now inform the court.

Application granted.