STATE v RATU JOPE SENILOLI and 5 Ors (HAC0028 of 2003S)

HIGH COURT — CRIMINAL JURISDICTION

SHAMEEM J

19, 26, 27 July 2004

Practice and procedure — applications — motion in arrest of judgment — whether charge in the information stated an offence — Criminal Procedure Code ss 144, 301(1) — Penal Code — Public Order Act ss 5, 5(a), 5(b), 7.

On 19 May 2000, George Speight and his supporters held as hostage the Prime Minister and other members of the parliament. Ratu Jope Seniloli was offered the position of President and the other accused were offered various ministerial posts in the Speight government. They all took an oath of the positions they accepted.

The Accused were charged with the offence of taking an engagement in the nature of an oath to commit a capital offence.

The defence submitted that: (a) the charge in the information with respect to the accused persons was duplicitous on the ground that s 5(b) of the Public Order Act (the Act) refers to the taking of an oath or engagement but does not clearly and specifically indicate the description of the said oath under para (a) of s 5 of the Act and that because of the reference "purporting to bind that person to commit an offence punishable by death" had the effect of charging the accused of two charges in one; and (b) there were two charges in one, the taking of the oath and treason.

On s 293 of the Criminal Procedure Code, counsel for the Accused submitted that the information and prosecution are incompetent because there was no evidence that the Public Safety Act had been utilised by the late President, and because the Public Order Act takes effect only upon the passage of the Public Safety Act Regulations.

Held — (1) The court held on the matter in Ex 9 that the significance of the evidence that Browne went to the Government Printer with a copy of the regulations to gazette the regulations was that steps were taken by the President to assume executive authority over the country. However, such matter was not in dispute and since there had been extensive cross-examination on the form of the Public Emergency Regulations compared with other regulations and decrees exhibited by the defence, so the court ruled that the same will assist the assessors in due course to enable them to see the very regulations which was the subject of extensive cross-examination and the prosecution was allowed to mark the exhibit as Ex 9.

(2) The court held that s 5(a) and (b) of the Act refer to different offences. While para (b) provides "takes any such oath or engagement, not being compelled to do so", the description of the oath or engagement is specifically indicated in full under para (a) which says "Any person who administers, or is present at, or consents to the administration of any oath or engagement in the nature of an oath purporting to bind that person who takes it to commit murder or any offence punishable by death, shall be guilty of an offence and shall be liable upon conviction". The words "any such oath or engagement" in para (b) refers only to an oath or engagement which is made an offence under para (a). The core of the offence under para (a) is that the oath or engagement in the nature of the oath should have purported to bind that person who takes it to commit an offence punishable by death or to commit murder. Thus, in order to charge an accused under para (b), one must refer and consider the definition of the oath under para (b). Accordingly, the submission of the defence that the prosecution should have charged the offence under para (b) and not to have referred to the description under para (a) would have resulted to give sufficient particulars to the accused cannot stand.

(3) Finally, the Act was separate and distinct from the Public Safety Act, and there are a number of provisions which apply at all times whether or not there was a public

emergency. Thus, a person who committed an offence under s 5(b) of the Act can be prosecuted at any time without correlating it with the Public Safety Act.

Determination made.

Cases referred to

Hawthorne (Department of Health) v Morcam Pty Ltd (1992) 29 NSWLR 120; *He Kaw Teh v R* (1985) 157 CLR 523; 60 ALR 449; *Lynch v Director of Public Prosecutions for Northern Ireland* [1975] AC 653; [1975] 1 All ER 913; *Proudman v Dayman* (1941) 67 CLR 536; [1944] ALR 64; *R v Hudson* [1971] 2 QB 202; [1971] 2 All ER 244; *R v Abusafiah* (1991) 24 NSWLR 531; *R v Baker* (1999) 2 Cr App Rep 355; *R v Bowen* (1996) 2 Cr App Rep 157; *R v Carr-Briant* (1943) KB 607; [1943] 2 All ER 156; *R v Conway* [1989] QB 290; [1988] 3 All ER 1025; *R v Dudley* (1884) 14 QBD 273; 49 JP 69; *R v Edwards* [1975] QB 27; [1974] 2 All ER 1085; *R v Howe* [1987] AC 417; [1987] 1 All ER 771; *R v Hunt* [1987] AC 352; [1987] 1 All ER 1; *R v Keith* (1855) 24 LJMC 110; *R v Turner* (1816) 5 M & S 206; *R v Steane* [1947] KB 997; *Trial of William Edgar* (1817) ER 145, cited.

State v Viliame Savu [2002] FJHC 73; *State v Ratu Timoci Silatolu* [2002] FJHC 71; *R v Eadon* (1813) ER 1064, considered.

M. Tedeschi, *G. Allan* and *A. Prasad* for the State

M. Raza for the first Accused

A. K. Singh for the second Accused

S. Naqase for the third and sixth Accused

D. Sharma for the fourth Accused

A. Seru for the fifth Accused

Shameem J. My ruling on the matter is that all Accused persons must remain here until the end of the prosecution case. If any accused person wishes to be released thereafter until tomorrow morning they have leave to do so. Indeed, if any of the other accused persons also wished to be excused, it's entirely up to them. They may also be excused until 9.30 tomorrow morning. I do ask all accused persons who have some input into funeral arrangements and reguregu to try and sought it out today and early tomorrow morning, so that we can continue tomorrow.

Ruling

The prosecution now wish to tender MFI(9) which is the Public Emergency Regulations under the Public Safety Act. It purports to have been printed by the Government Printer in 2000 and the name of the Government Printer is printed at the bottom, and there appears to be a signature KKT Mara which appears to be that of the President of the Republic of the Fiji Islands. The defence objects to the tendering of this exhibit at this stage.

First, because Mr Singh submits that this is the document which had not been previously disclosed to the defence. Second, because this is not a document which Mr Joseph Browne himself prepared. It was not a draft of his own making. Third, because the contents of the Public Emergency Regulations was not a matter of cross-examination.

The reason for the identification of the Public Emergency Regulations in the course of Mr Joseph Browne's evidence was that, his evidence that he went to the Government Printer with the copy of these regulations and that he asked the Government Printer to gazette the regulations on the evening of 19 May. The

significance appears to be, that at that particular point in time, steps were being taken by the then President to assume some kind of control over the country.

Since that is a matter which is not significantly in dispute, and since there has been extensive cross-examination on the form of the Public Emergency Regulations as compared with other regulations and decrees which have been exhibited by the defence, it will be of assistance to the assessors to be able to see the very regulations, basis of which was the subject of extensive cross-examination.

As to the weights that can be put on the contents of the regulations that will be the subject of my direction to the assessors in due course. For the time being I will allow the prosecution to mark this exhibit as Ex 9. That's my ruling.

Ruling on s 293 of the Criminal Procedure Code

The prosecution have now closed their case. The Accused persons submit that there is no case for them to answer, and counsel have made several legal submissions on the law. This is an opportune time to deal with them, and then to rule on s 293 of the Criminal Procedure Code.

The elements of the offence

There is no dispute that the following elements must be proved by the prosecution:

(1) the Accused;
(2) took an engagement in the nature of an oath;
(3) purporting to bind the accused; and
(4) to commit treason.

There is an additional element of "not being compelled to do so" which the prosecution says is a negative averment, but which the defence says, is just another element to be proved by the prosecution, the evidential basis for which must be raised by the defence.

There is no dispute that each Accused took part in the ceremony depicted in the footage the court saw, nor that each Accused said the words we heard on video and saw on the printed oath forms exhibited by SP Waisea Tabakau. There is no dispute that treason includes the armed takeover of a government, "with intent to levy war. Section 50 of the Penal Code provides:

> Any person who compasses, imagines, invents, devises or intends any act, matter or theory, the compassing, imagining, inventing, devising or intending whereof is treason by the law of England for the time being in force, and expresses, utters or declares such compassing, imagining, inventing, devising or intending by publishing any printing or writing or by any overt acts or does any act which if done in England, would be deemed to be treason according to the law of England for the time being in force, is guilty of the offence termed treason and shall be sentenced to death.

The charges against all Accused persons are in identical terms. They say that each Accused person, on 20 May 2000 at Veiuto in Suva, not being a person compelled to do so, took an engagement in the nature of an oath purporting to bind the said Accused to commit an offence namely treason.

The common law on treason shows that the definition of treason expanded over the years. In the case of *State v Viliame Savu* [2002] FJHC 73, Gates J said that the words "to levy war against our Lord the King in his realm" has been given a wide interpretation. He said:

> "War" has been interpreted to extend constructively to include forcible resistance to authority of the government in some public or general respect, or by an armed force whose purpose is to usurp the government in matters of a public or general nature.

In *State v Ratu Timoci Silatolu* [2002] FJHC 71, Wilson J summarised the law on treason thus:

> In the light of those authorities, it may be concluded that, if there was a conspiracy to overthrow the Government of England and if the conspirators, for that purpose and in furtherance therefore, did use unlawful force and other unlawful means, and, in particular, did a number of acts, including: — the taking over of the House of Commons at Westminster and the unlawful detention of the British Prime Minister, various members of his Cabinet and various other Members of the House of Commons and others for the purpose of, and with intent to, overthrow the lawful Government of England; the seizure, taking, detaining of hostages; the formation of an illegal Government, the abrogation of the Constitution and other laws of England; and the purported appointment of a Head of State other than the Monarch, a Prime Minister and others under a rebel Government, then that would constitute treason in England.

It follows that such acts would constitute treason in Fiji.

There appears to be no dispute as to the definition of treason. The real dispute at this stage of the trial is as to the meaning of the words "purporting to bind the accused" and as to whether these words refer to a mens rea of specific intent, that is of an intent to bind oneself to commit treason. The other area of dispute is as to the scope of the defence of compulsion in this case.

As for the submissions made as to sufficiency of evidence beyond reasonable doubt, they are submissions properly made to the assessors.

Counsel for the fourth Accused (A4) submitted also that there was no evidence to go before the assessors of "an engagement in the nature of an oath" because the entire ceremony was illegal and non-binding, A4 had not been appointed as a minister properly under the Constitution, and the "oaths" could not have been binding. If he means that there is no evidence that engagements were taken in the nature of an oath, then I cannot agree. The words used in the oath ceremony closely resemble the constitutional oaths and the offence requires proof of the taking of an engagement *in the nature of an oath*. The lawfulness of the oath or the legal correctness of it is not relevant and it is not open to the defence to suggest to the assessors that because the Speight government was illegal per se, then no one can be prosecuted or convicted to agreeing to take an engagement in it. There is evidence to put before the assessors that words which appeared to be an oath, relating to engagements in the illegal government, were read by each Accused person. The question of whether the words of the oaths themselves in the context of the events at parliament, appeared to bind the Accused is relevant however, to the next element of the offence, the "purporting."

Purporting

There is no statutory definition of this word. Mr Sharma suggests that it means "with intent to bind the Accused person to commit treason".

He referred me to the case of *R v Steane* [1947] KB 997 to suggest that the prosecution should prove a specific intent to be bound to commit treason. However the offence charged in that case included a specific definition of an intent to assist the enemy, and the court held that it is not enough for the prosecution to rely on a general presumption of intent as to the natural consequences of one's act. That case cannot assist in this trial, because there is no reference in s 5(b) of the Public Order Act to an intent to be bound to commit treason.

The other defence counsel submits that the word "purporting" means "intending". Mr Singh and Mr Raza referred me to *He Kaw Teh v R* (1985) 157 CLR 523; 60 ALR 449; *Proudman v Dayman* (1941) 67 CLR 536; [1944]

ALR 64 and *Hawthorne (Department of Health) v Morcam Pty Ltd* (1992) 29 NSWLR 120 and submitted that some proof of an intention to bind oneself to treason was necessary. In particular they relied on these cases to say that an honest and reasonable mistake of fact was available to all charges whether or not the statute specifically provided for mens rea. I accept these submissions, and the dicta in all the cases cited. I do not consider the offences charged in this case to be offences of strict or absolute liability and I consider that the prosecution must prove that the Accused intentionally took the oaths alleged. Further, the prosecution must prove that the oaths taken, purported to bind each Accused to commit treason.

State counsel has referred me to several dictionary definitions of the word "purport". *Black's Law Dictionary* (6th ed) defines purport as, inter alia, "meaning, import, substantial meaning, substance, legal effect". It further states: "The 'purport' of an instrument means the substance of it as it appears on the face of the instrument, and is distinguished from 'tenor' which means an exact copy".

Stroud's Judicial Dictionary defines the word in relation to a criminal offence as "pretending". It states — "An instrument purports to be that which, on the face of the instrument, it more or less accurately resembles. The definition of 'purporting' is the same whether applicable to the whole or to a part of an instrument. There must be a resemblance more or less accurate". (per Coleridge J, *R v Keith* (1855) 24 LJMC 110) which case shows that proof that a forged engraving "purports" to be what it is not is furnished by comparing it with a genuine one".

The Concise Oxford Dictionary of Current English (5th ed) defines "purport" as "meaning, sense, tenor of document or speech" and "have as its meaning, convey, state, profess, be intended to seem (to do)".

In *R v Eadon* (1813) ER 1064 the defendant was charged with administering an oath intended to bind the person taking it, to be of an association, society and confederacy formed to disturb the public peace, and to bind that person not to give evidence against that association. Since the statute under which the defendant was charged specifically used the word "intended to bind" in addition to "purporting to bind" the decision is not precisely on point. Further in that case, the person taking the oath, one Richard Howells, was not charged, and his evidence was that he had no intention of being bound by the oath he took. In his summing-up to the jury the presiding judge (Le Blanc J) said that the jury had to be satisfied first that the defendant administered the oath, and second that he should have intended to bind Howells who took it. He said:

> Whether the man who took it meant to be bound by it, is not material to the charge against the prisoner, if he who gave it intended it should be considered obligatory.

The case of *Trial of William Edgar* (1817) ER 145 concerns a trial on charges of taking oaths or engagements purporting or intending to bind the person taking the oaths to commit treason. The report contains extensive definitions of the word "purporting" but since they all appear in counsels' speeches, they are not as helpful as they might be. The indictment was subsequently overtaken by another indictment for other offences. However, in respect of the first indictment, counsel at least appeared to agree that the word "purporting" referred not to the mind of the defendant, but to the words of the oaths taken and to the apparent meaning of the words. That construction is consistent with the dictionary meanings of the word.

I consider therefore, that the word “purport” refers to the apparent, or stated meaning of the oaths themselves. The intention of the Accused is relevant only to the act of the taking of the engagements in the nature of the oath. Thus if the Accused did not take the ceremony seriously, or they thought it was a joke, as Mr Sharma says in his submissions filed today, he can be said to be disputing the taking of the engagement. The question of the purported meaning of the engagements in the nature of the oath, is for the assessors to consider on an objective test. The assessors will be asked if they are satisfied beyond reasonable doubt, that on the ordinary meaning of the words of the oath taken, the Accused persons were undertaking or promising to commit acts of treason. It is irrelevant that the Accused did not intend that the taking of the engagements would be committing him to treason. What is relevant is that he intentionally took an engagement in the nature of an oath which appears from the words of the oath itself, to bind him to commit treason.

As to whether the purported effect of the words of the oaths had this effect, is a question of fact for the assessors, having been directed as to the legal definition of treason, in the context of the armed takeover of parliament, and in the light of all the evidence led.

Compulsion and the burden of proof

The prosecution agree that despite the statutory limitation or the availability of compulsion under s 7 of the Public Order Act, the defence should be allowed to be put it before the assessors provided the evidential basis for the defence has been laid by the defence and provided the assessors are told that the burden rests on the defence to prove compulsion on a balance of probabilities.

Counsel for the defence agree that the defence should raise the issue, but say that it is for the prosecution to disprove compulsion.

The words of s 5 of the Public Order Act read:

> 5. Any person who—
>
> (a) administers, or is present at or consents to the administration of, any oath, or engagement in the nature of an oath, purporting to bind that person who takes it to commit murder or any offence punishable by death; or
>
> (b) takes any such oath or engagement, not being compelled to do so,
>
> shall be guilty of an offence and shall be liable on conviction to imprisonment for life.

The words “not being compelled to do so” clearly create a negative averment. Section 144 of the Criminal Procedure Code provides:

> Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the Act creating such offence, and whether or not specified or negatived in the charge or complaint, may be proved by the defendant or accused, but no proof in relation thereto shall be required on the part of the complainant or prosecution.

In *R v Edwards* [1975] QB 27; [1974] 2 All ER 1085, the English Court of Appeal held that the burden of proof rested on the defence to prove exceptions, excuses or qualifications, and that both the legal and evidential burden shifted to the defence in such cases. The decision was considered by the House of Lords in *R v Hunt* [1987] AC 352; [1987] 1 All ER 1. The court held that a “negative averment” can arise either specifically or by necessary implication. In *R v Carr-Briant* [1943] KB 607; [1943] 2 All ER 156, it was held that the standard of proof in such cases was the standard required in a civil case. It is usually

referred to as the "balance of probability" and the jury should be told to consider whether a fact was more probable than not and more likely than not.

In *State v Viliame Savu* [2002] FJHC 73, Gates J considered the elements of the offence in relation to s 52 of the Penal Code. That section provides that any person who knowing that any person intends to commit treason "does not give information thereof with all reasonable dispatch to the Governor-General, the Minister or to a magistrate" is guilty of the offence termed misprison of treason. He found the words to create a negative averment and said (at p 26 of his ruling):

> Whether it is to be founded on the information for the excuse being peculiarly within the knowledge of the accused, *R v Turner* (1816) 5 M & S 206 or whether as a matter of pleading and ease of proof of an issue in a trial, it seems that it is more appropriate and practical that the burden of proof be placed (as an exception to the normal burden) upon the Accused.

In this case, the words "not being compelled to do so" provide for an excuse for the commission of the offence. It is a negative averment and the burden of proving compulsion rests on the defence. It must be proved on a balance of probabilities.

The definition of compulsion

There is a statutory definition of compulsion in the Penal Code. Section 16 provides:

> A person is not criminally responsible for an offence if it is committed by two or more offenders, and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or do him grievous bodily harm if he refuses; but threats of future injury to not excuse any offence.

However s 2(a) of the Penal Code provides that the Code does not apply to the trials of persons for offences created by other laws in force in Fiji. Counsel for the State and for the defence submit that the common law definition applies. I agree. In any event it is a definition which is more favourable to the Accused.

I have considered s 7 of the Public Order Act. That section provides that:

> A person who takes any such oath or engagement as is mentioned in sections 5 and 6 may not set up as a defence that he was compelled to do so, unless within fourteen days after taking such oath or engagement, or if he is prevented by actual force or sickness, he declares by information to a police officer or by information on oath before a magistrate, or, if he is on actual service in Her Majesty's Armed Forces or in the Royal Fiji Police Force, either by information on oath before a magistrate or by information to his commanding officer, the whole of what he knows concerning the matter, including the person or persons by whom and in whose presence and the place where and the time when, the oath or engagement was administered or taken.

All counsel agree that the section does not apply. Mr Sharma submits that there was uncertainty in the nation as to who held authority and that it was neither safe nor practical for the Accused to make such complaint. Mr Seru submits that the Accused did not know they were committing an offence, and therefore that they did not know that they should lay a complaint.

State counsel agrees that the defence of compulsion ought to be put to the assessors, and suggests that because the purpose of s 7 is to ensure disclosure of information against those taking (or taking part in) secret criminal oaths, and because this oath-taking ceremony was conducted in a most public sphere, s 7 had in fact been complied with in spirit.

It is correct that there was no attempt, either at the time or after police investigation commenced, to suppress information about the ceremony itself. Indeed disclosure was effected at the time of the ceremony, simply as a result of the presence of the media. There would have been no purpose in later reporting the matter to the authorities, when the authorities already knew about the ceremony.

Further, as Mr Sharma submits, there was uncertainty in Fiji, both politically and legally until the High Court decision in *Republic of Fiji v Chandrika Prasad*. In the circumstances I consider that the Accused (the second, third, fourth, fifth and sixth) ought to have the defence of compulsion considered by the assessors in the circumstances of this case.

The common law definition of duress emerges from a number of decided cases. Lord Simon in *Lynch v Director of Public Prosecutions for Northern Ireland* [1975] AC 653; [1975] 1 All ER 913, said that duress was "an extremely vague and elusive juristic concept". Duress includes threats of death or grievous bodily harm, held out to the Accused throughout the whole time of the offending (*R v Bowen* (1996) 2 Cr App Rep 157) and the threat of future injury is acceptable (*R v Hudson* [1971] 2 QB 202; [1971] 2 All ER 244). The question of whether an opportunity was reasonably open to the Accused to render the threat ineffective, is relevant and in considering what is a reasonable opportunity to, for instance escape the threats, the age and circumstances of the Accused and any risk to him can be considered: *R v Baker* (1999) 2 Cr App Rep 355.

State counsel referred me to a passage in the "*Criminal Law of New South Wales*" (Watmore Hoskey et al) which states (at para 57):

> The relevant direction in relation to the objective test for duress should therefore be that the prosecution must establish that there is no reasonable possibility that a person of ordinary firmness of mind and will would have yielded to the threat" [*R v Abusafiah* (1991) 24 NSWLR 531].

And, in the same passage:

> It has been held in England that public policy requires that an accused should have the self-control and steadfastness reasonably to be expected of the ordinary citizen in the accused's situation, and therefore required that the defence of duress should be limited not only by the *subjective* test of whether the accused was impelled to act as he did because, having regard to what he reasonably believed another to have said or done, he had good cause to fear the other would kill him if he did not so act, but also, if that were so, by the objective test of whether a sober person of reasonable firmness, sharing the accused's characteristics, would have responded to whatever he reasonably believed was said or done by the other person in taking part in the killing.

The defence will be put to the assessors in this way, the only other direction being that it is for the defence to prove that duress applies on a balance of probabilities.

Mr Raza and Mr Singh also made submissions that necessity was available on the facts. There is no statutory definition of necessity in Fiji. The common law definition is limited in its scope and is rarely relied upon. In the well-known case of *R v Dudley* (1884) 14 QBD 273; 49 JP 69, the defence attempted to rely upon it on a charge of murder (the necessity alleged was the need to survive on a boat by murder for the purpose of cannibalism). In *R v Conway* [1989] QB 290; [1988] 3 All ER 1025, the English Court of Appeal said that duress is an example of necessity, and that in effect the tests were the same. In *R v Howe* [1987] AC 417; [1987] 1 All ER 771, Lord Hailsham said (at AC 429; All ER 777) that

duress arises from threats and violence, and necessity arises "from any other objective dangers threatening the accused".

In this case the defence allege the former and I have already ruled that the defence of duress can be considered by the assessors. Necessity is not available on the facts of this case.

Section 293

Mr A K Singh on behalf of all Accused submits that the information, and prosecution are incompetent because there is no evidence that the Public Safety Act had been utilised by the late President, and because the Public Order Act could only come into effect when Public Safety Act Regulations were passed. I cannot agree. The Public Order Act exists separately from the Public Safety Act, and there are a number of provisions in it which obviously apply at all times, whether or not there is a public emergency. A person committing an offence under s 5(b) of the Public Order Act can be prosecuted for it at any time, and I see no link with the Public Safety Act.

I understand that the Regulations identified by Mr Brown and tendered by the prosecution, to be evidence of background information only, and in relation to an undisputed matter. That is, that on 19 May 2000 Ratu Mara was in office, and attempting to exercise executive authority.

The question for the judge at the end of the prosecution case is whether there is no evidence in relation to each element of the offence. I consider that there is evidence in respect of each element of the offences charged, and that each Accused must be put to his defence.

Determination made.