STATE v SIMIONE KAITANI and 3 Ors (HAC044 of 2004S)

HIGH COURT — CRIMINAL JURISDICTION

GATES J

6, 16 June 2005

Criminal law — trial — unlawful oath to commit capital offence — whether constitutional redress appropriate — whether judge disqualified — whether right to counsel denied — whether time bar avoided — whether delay occurred — Constitution ss 29(1), 40, 41(2), 120(2) — Public Order Act (Cap 20) s 5(b) — High Court (Constitutional Redress) Rules 1998 rr 4(3)(a), 7, O 8 r 3(2), O 18 r 18 — Penal Code (Cap 17) ss 20, 50.

The four Accused (Accused) were alleged to have taken an illegal oath of ministerial office to join the cabinet of George Speight, who was the instigator of the coup d'état in May 2000. The Accused were charged with one count each of taking engagement in the nature of oath to commit a capital offence contrary to s 5(b) of the Public Order Act (Cap 20) (PO Act) in conjunction with s 20 of the Penal Code (Cap 17) (the Code). The Accused were arraigned and pleaded not guilty. The pre-trial conference proceeded on the same day they were arraigned. The Accused were charged and the continuation of the pre-trial conference was set. The fourth Accused (A4) filed a motion which sought to stay the proceeding. With the papers not having been served, the court set a timetable for the same to be done and the affidavits to be filed. The hearing for the motion was set and the trial was postponed. The first, second and third Accused (A1, A2 and A3 respectively) were granted more time to prepare the applications for their cases. A fresh time table was set for the motions and the affidavits in support to be filed and to allow the State time to respond. On the very day set for the hearing, A1, A2 and A3 explained that they had just been handed the director's affidavit in opposition, for which they sought time to make a reply. The director had been unable to serve the counsel of A1, A2 and A3 the opposing affidavit earlier. Since service of all the material and the affidavits have not been completed on the date of the hearing, the matter was postponed. The hearing was postponed further due to a number of reasons.

The pre-trial issues were whether: (1) constitutional redress was appropriate; (2) the judge should disqualify himself and transfer trial; (3) there was denial of right to consult with counsel prior to interview; (4) there was avoidance of time bar; and (5) there was abuse of process due to delay. The Accused also sought an order for the permanent stay of the trial.

Held — (1) Constitutional redress was not the appropriate jurisdiction to be used. The grounds raised are matters that can be raised both as trial and pre-trial issues and could be raised as motions without reference to the civil remedy of constitutional redress. The motions were dismissed since they were likely to delay the fair trial of the proceedings and were being an abuse of the process of the court.

(2) The judge declined to disqualify himself and to order transfer. Even if the judge presided over a constitutional case (*Chandrika Prasad v Republic*), it did not thereafter preclude a judge from sitting on a wrongful swearing-in case, which formed a small fragment at the corner of the constitutional picture. The two cases did not have the same parties and did not deal with the same issues or evidence. Thus, recusal was not appropriate.

The court ruled that directions will be given to the assessors to avoid partiality and prejudice just like in any trial. Moreover, the transfer may be considered either by the counsel's application or by the court's own motion. The transfer was declined as the judge saw no special prejudice to the Accused if the trial was held in Suva and saw no advantage in transferring the case to Lautoka for hearing.

(3) A4 agreed to go ahead with the interview without speaking to a solicitor even though he was advised of his right to consult a counsel. Thus, the court declined to deal with the disputed evidence ahead of any preliminary examination that may be called for during the course of the trial.

(4) There was no abuse of process as a result of the bringing of the public order charges, and that a fair trial would be possible. The public order charge was an offence contrary to s 5(b) of the PO Act and was separate and distinct from treason in s 50 of the Code. It was not established that the evidence in the case would in fact prove the offence of treason. The offence under s 5 or s 6 of the PO Act was not necessarily a lesser offence in relation to s 50 of the Code. It was not an abuse of process per se, to lay a less serious charge when the time limitation on the more serious charge had expired. There was no consideration that it would be impossible for the Accused to be given a fair trial because a lesser charge had to be preferred.

(5) The delay in charging the Accused caused minimal prejudice. There was no abnormal delay since the matter first came to court in December 2004. Some of that time had been taken up trying to ensure legal representation for two of the present Accused. One was concerned therefore with pre-charge delay, which was a period of four-and-a-half years from May 2000. No details were given as to the nature of the evidence that would have been given and to which issue it would have gone in the defence. The nature of the evidence from those witnesses was not provided. The facts and the charge though serious were uncomplicated. The allegation concerned an incident of short duration, the simple oath taking of the Accused.

Application dismissed.

Cases referred to

R v J [2003] 1 WLR 1590; [2003] 1 All ER 518; [2002] EWCA Crim 2983; *R v Saraswati* (1989) 18 NSWLR 143; 47 A Crim R 1, approved.

Apaitia Seru v State [2003] FJCA 26; *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142; *Chokolingo v Attorney-General (Trinidad and Tobago)* [1981] 1 WLR 106; [1981] 1 All ER 244; *Re Ashton* [1994] AC 9; [1993] 2 All ER 663; (1993) 97 Cr App Rep 203; *Ex parte Guardian Newspapers Ltd* [1999] 1 WLR 2130; [1999] 1 All ER 65; [1999] 1 Cr App Rep 284; *Hinds v Attorney-General* [2002] 4 LRC 287; *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451; [2000] 1 All ER 65; *Martin v Tauranga District Court* [1995] 2 NZLR 419; *R v Morin* (1992) CR (4th) 1; *R v Tonner* [1985] 1 WLR 344; [1985] 1 All ER 807; (1984) 80 Cr App R 170; *Rajesh Rajeshwar Prasad v State* Crim App HAA031 of 2003S; *Re Medicaments (No 2)* [2001] 1 WLR 700, cited.

Abhay Kumar Singh v Director of Public Prosecutions [2004] FJCA 37; *Amina Koya v State* [1998] FJSC 2; *Prasad v Republic* [2000] 2 FLR 89; [2001] 1 LRC 665; [2001] NZAR 21; *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577; [1968] 3 All ER 304; *Porter v Magill* [2002] 2 AC 357; [2002] 1 All ER 465; [2001] UKHL 67; *R v Latif* [1996] 1 WLR 104; [1996] 1 All ER 353; [1996] 2 Cr App R 92; *R v A Resident Magistrate; Ex parte Taniela Veitata* [1977] 23 FLR 172; *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256; *Seniloli v State* [2004] FJCA 46, considered.

A. Prasad and *V. Lidise* for the State

I. Khan for the first, second and third Accused

R. Matebalavu for the fourth Accused

Gates J.

Ruling No 3

Pre-trial applications; one Accused raising a few days before date set for trial, and the others, on original date fixed for trial; jurisdiction for Constitutional Redress; Constitution s 120(2), ss 40, 41(2); whether a criminal or civil

jurisdiction High Court (Constitutional Redress) Rules 1998, R7; whether collateral application; attitude of courts to; existence of alternative remedy not yet exhausted; availability of remedy in trial process; constitutional redress not appropriate;

Disqualification; bias; impartiality of tribunal part of right to fair trial s 29(1) Constitution; Notices of Motion should set out grounds Order 8 r 3(2); r 4(3)(c) High Court (Constitutional Redress) Rules; apparent bias; Gough test adjusted in Porter v Magill deleting "a real danger"; Judge had previously heard civil constitutional case; different parties, issues, and evidence;

Transfer; application by party; expediency and for ends of justice; prejudice of persons said to be aggrieved by coup leader in Suva area;

Right to consult counsel; impugned evidence; matter to be ventilated in a voir dire in usual way; not a matter for ruling in advance of trial process;

Abuse of process; avoidance of statutory time limits; 2 year limit for treason none for s 5(b) Public Order offence; two offences different; to charge both not duplicitous; whether fair trial possible; whether affront to public conscience; weighing of public interest; end does not justify any means;

Abuse of process; pre-charge delay; reasons for; whether Accused prejudiced; whether prejudice shown; whether charges complex; resource constraints; societal interests.

[1] Defence counsel on behalf of all four Accused raise pre-trial issues of disqualification and transfer and abuse of process matters, namely denial of right to consult with counsel prior to interview, avoidance of time bar and delay. They also seek an order for permanent stay of the trial.

[2] The trial was originally set for 26 May 2005. On 22 April 2005 the Accused were arraigned. All four of the present Accused pleaded not guilty to the count on the information that concerned each separately. They are charged with one count each of taking an engagement in the nature of an oath to commit a capital offence, contrary to s 5(b) of the Public Order Act (Cap 20) read with s 20 of the Penal Code (Cap 17) [as it was at 20 May 2000, the date of the offence]. The pre-trial conference proceeded the same day, 22 April 2005.

[3] On that occasion I asked if there were to be any preliminary objections raised or any motions. Mr Khan referred to exhibits but did not mention any specific motion. Mr Rabo said some applications would be made. The matter was adjourned to 20 May 2005 for continuation of the pre-trial conference so that certain evidence could be agreed.

[4] On 19 May 2005 Mr Rabo filed a motion for his client seeking stay. On 20 May 2005, the papers not having been served, the court set a timetable for this to be done and for opposing affidavits to be filed. The hearing of the motion was set for 26 May 2005, the day fixed for the commencement of the trial. Meanwhile the trial was put off till 1 June 2005. If there were to be an application for an adjournment the court directed Mr Rabo to come by way of a motion and affidavit.

[5] On 26 May 2005 the assessors were informed that there were matters to be dealt with first which did not concern them. Without being sworn in, they were released to be recalled the following week.

[6] Before submissions began Mr Khan stood up to say he had three new applications to raise. They raised similar issues to those of Mr Rabo. Mr Khan said he had only just been instructed by Accused 2 (A2) and 3 (A3) and needed more time to prepare applications in their cases. This did not explain the lack of

a motion for Accused 1 (A1) whose motion should have been ready earlier. However, Mr Khan was granted time for A2 and A3's motions to be prepared as well as that for A1. A fresh timetable had to be set for the motions and affidavits in support to be filed and to allow the State time to respond. The hearing was refixed for 2 June 2005.

[7] On that day Mr Khan said he had only just been handed the director's affidavit in opposition at 9.40 that morning. He sought time to make a reply to it. His fax machine had been out of order in Lautoka and the director had been unable to serve him the opposing affidavit earlier. Since service of all the material, the affidavits, had not been complete on the date of hearing, the matter was put off till 3 June 2005. On that day the court was informed Mr Khan was sick and the hearing had to be put off further till after the public holiday weekend to 6 June 2005.

Jurisdiction for constitutional redress

[8] The applications dealing with disqualification and transfer initially do not suggest a civil jurisdiction. The issues raised might arise during a trial, at the commencement of the trial or as a pre-trial application. The applications might be filed at the threshold of the trial, as here or be filed some weeks prior to trial.

[9] However, both disqualification and transfer may be raised under the generic umbrella of the right to a fair trial (s 29(1) of the Constitution) and as such raise protections provided by the Constitution for which redress might be sought. All of the other grounds also raise constitutional matters.

[10] The High Court exercises an original jurisdiction in any matter arising under the Constitution or involving its interpretation: s 120(2) of the Constitution.

[11] Section 40 of the Constitution provides for application to be made to the High Court for redress if the person considers that his or her rights under the Bill of Rights chapter have been contravened. The right to apply exists additional to any other action that might be taken: s 41(2).

[12] There seems little difference in reality between an application made within the trial itself or when the trial is deemed to have commenced (*R v Tonner* [1985] 1 WLR 344; [1985] 1 All ER 807; (1984) 80 Cr App R 170; *Rajesh Rajeshwar Prasad v State* Crim App HAA031 of 2003S and one made just prior to the swearing in of the assessors. In all of these situations the application and the decision forms "an integral part of the trial process": *Re Ashton* [1994] AC 9; [1993] 2 All ER 663; (1993) 97 Cr App Rep 203 per Lord Slynn of Hadley; *Ex parte Guardian Newspapers Ltd* [1999] 1 WLR 2130; [1999] 1 All ER 65; [1999] 1 Cr App Rep 284.

[13] The State claims these applications should have been filed in the civil registry of the High Court, and cited in support *Abhay Kumar Singh v Director of Public Prosecutions* [2004] FJCA 37 (*A K Singh*).

[14] The Court of Appeal had stated (at 11) that r 7 of the High Court (Constitutional Redress) Rules 1998 was plain in its terms, and that "an application for constitutional redress even if it pertains to a criminal matter should be filed in the civil jurisdiction of the High Court". This would mean that such applications even if, as here, brought at the last moment, at the threshold of the criminal trial or even in the course of a trial, were still to be filed in the civil registry.

[15] As foreshadowed in the course of argument before the Court of Appeal and accepted by the court, "there was nothing to stop a criminal judge from hearing a constitutional redress application while sitting in the civil jurisdiction of the High Court". In such circumstances and to avoid fragmentation of the trial process as pointed out by Shameem J in the High Court proceedings, it would be inevitable and appropriate that the civil application should be referred to the trial judge for hearing.

[16] To that procedure, the court held, that the practice and procedure of the High Court in relation to civil proceedings applied, as well as the High Court Rules and that that meant the power to dismiss summarily under O 18 r 18 was also available if appropriate. The court held that Shameem J would have been able to reach the same decision in the civil jurisdiction as she had in the criminal jurisdiction: p 11.

[17] Although the Constitution expressly states that the redress is to be applied for without prejudice to any other action the Applicant may have (s 41(2)), the courts have disapproved of collateral attacks on one court via courts of another exercising co-ordinate jurisdiction. The Privy Council described such parallel proceedings as "quite irrational and subversive of the rule of law which it is the declared purpose of the Constitution to enshrine": *Chokolingo v Attorney-General (Trinidad and Tobago)* [1981] 1 WLR 106; [1981] 1 All ER 244 at 249; *Hinds v Attorney-General* [2002] 4 LRC 287 at 300, 303 (*Hinds*).

[18] Just as in *Hinds* at 300 where the ordinary processes of appeal were held to have offered the Appellant an adequate opportunity to vindicate his constitutional right, so in this case all grounds raised are matters properly to be raised as trial or pre-trial issues. They are broadly part of the trial process and could have been raised as motions without reference to any civil remedy of constitutional redress. Indeed, if the matters inescapably must be heard and ruled on in the trial process itself, the parties need not resort to the alternative remedy of constitutional redress *A K Singh* at 20, 21. Constitutional redress is not the appropriate jurisdiction to be exercised here. I therefore dismiss the motions on the grounds that they are likely to delay the fair trial of the proceedings and as being an abuse of the process of the court: O 18 r 18. However, I will now go on to consider each of the motions as if each had been brought as an application in the trial process.

Disqualification

[19] Though a person charged with an offence has a right to a fair trial (s 29(1)) it is only in regard to civil disputes that the Constitution expressly accords a party the right of determination by a court of law or by an independent and impartial tribunal. This is a right which applies equally to the State which represents the people of Fiji. It goes without saying that a criminal trial will only be fair if the tribunal is both independent and impartial. The hearings of the criminal courts are open to the public, a measure which permits observation of the fairness or otherwise of proceedings.

[20] The notices of motion filed in this case state the orders which are sought but omit to state, within the notices themselves, the grounds relied on. These are only to be ascertained from the affidavits of Accused 4 (A4) and A1 and in the course of submissions both written and oral. The grounds should form part of the respective notices in order to comply with either r 4(3)(a) of the High Court (Constitutional Redress) Rules 1998 or O 8 r 3(2) of the High Court Rules. What

the responding party or court requires is notice of the nature of the grounds relied on. By providing such grounds within the notice, the opposing side and the court, have effective and proper notice of what is to be urged.

[21] Accused 4 provides his factual basis for seeking disqualification of myself as judge by stating that I had heard and decided the matter of *Prasad v Republic* [2000] 2 FLR 89; [2001] 1 LRC 665; [2001] NZAR 21 (*Prasad*). His affidavit in reply provided no other facts on the matter.

[22] Accused 1 swore an affidavit on behalf of himself and A2 and A3 on this same ground. His evidence related to the difficulty of obtaining assessors who would not have been affected by "the 2000 coup by George Speight". He gave no evidence relating to the trial judge.

[23] But Mr Rabo did set out in his written submission passages in my judgment in *Prasad* in that part headed "The salient facts" from which he said inferences could be drawn. From the cited passages the relevant extracts from the judgment referred to were:

(a) "Ratu Jope Seniloli was sworn in as the rebels choice of President."

(b) "Various members of the group were sworn in as Ministers and decrees under the auspices of the Taukei Civilian Government were published."

[24] Other passages cited were not relevant to the parties or issues for trial here, nor were the constitutional findings based on the case law. They had concerned the doctrine of necessity, the doctrine of effectiveness, the decrees, the Constitutional Review Committee and the legality of the Interim Civilian Government.

[25] Mr Khan for A1, A2 and A3 states in his submission that the material facts include the police interviews of his clients. Mr Khan adopted a similar line to Mr Rabo. Both counsel asserted that there was no suggestion that I as trial judge had any personal interest in the outcome of the trial. The nub of their concerns was that in mentioning in the *Prasad* case the salient facts in the course of that constitutional case that individuals had been sworn in as ministers, an issue in the instant case, the Accused considered they could not receive a fair trial.

[26] The issue of bias is raised in a way that is entirely without embarrassment and is one not likely to provoke indignation. It raises the concern encapsulated in the words of Lord Hewart CJ in *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259:

> it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

[27] In that case the conviction had to be quashed because the deputy clerk to the magistrates who retired with the justices when they left court to consider their decision was also a member of a firm of solicitors who were suing the Accused for damages arising out of the same incident, a motor vehicle collision.

[28] In *Amina Koya v State* [1998] FJSC 2 the Fiji Supreme Court reviewed the English, Australian and New Zealand authorities on bias. The court concluded (at 8):

> Subsequently, the New Zealand Court of Appeal, in *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142, held that it would apply the *Gough* test. In reaching that conclusion, the Court of Appeal considered that there was little if any practical difference between the two tests, a view with which we agree, at least in their application to the vast majority of cases of apparent bias. That is because there is little if any difference between asking whether a reasonable and informed person would

consider there was a real danger of bias and asking whether a reasonable and informed observer would reasonably apprehend or suspect bias.

[29] In *R v A Resident Magistrate; Ex parte Taniela Veitata* [1977] 23 FLR 172 (*Veitata*) the Applicant had appeared before the same magistrate a few weeks earlier and been sentenced to a term of imprisonment. In the course of his judgment while assessing sentence, the magistrate had commented strongly on the Applicant's behaviour based on the evidence before him.

[30] It was held there was no evidence to indicate that the magistrate held or had ever held any hostility towards the Applicant. The magistrate was aware of the Applicant's character and antecedents. Neither this knowledge nor his subsequent comments on the Accused's behaviour were held sufficient to disqualify him from hearing the case.

[31] In *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 599; [1968] 3 All ER 304 at 310 Lord Denning had said:

> It brings home this point: in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit.

He also added:

> Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other.

[32] Mishra Acting CJ noted in *Veitata* at 174E:

> No reference is made to anything in the resident magistrate's judgment which could be regarded as showing hostility to the applicant.

[33] The test in *R v Gough* [1993] AC 646; [1993] 2 All ER 724 was considered again in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451; [2000] 1 All ER 65 and in *Re Medicaments (No 2)* [2001] 1 WLR 700. The House of Lords reviewed the Strasbourg and Commonwealth jurisprudence in *Porter v Magill* [2002] 2 AC 357; [2002] 1 All ER 465; [2001] UKHL 67. The House agreed with the adjustment to the test as proposed by Lord Hope of Craighead, who said (at [102]–[103]):

> 85. When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.
>
> 103. I respectfully suggest that your Lordships should now approve the modest adjustment of the test in *R v Gough* set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the

> circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to "a real danger". Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court.

[34] The question to be posed now is (at [103]):

> whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

[35] The *Prasad* case was, as was said in the opening sentence of the judgment, "a case about the status of the Constitution in Fiji today". The Applicant claimed he had been adversely affected by the purported removal of the Constitution. It was a case in which the present Accused were not mentioned, nor their alleged acts, the subject of these charges, referred to.

[36] In the listing of salient facts in that judgment, a swearing in of the new President and of ministers was referred to. The circumstances however were not gone into. I had referred to the TV coverage of certain matters at the time, of which I took judicial notice. It seems plain that there were two ceremonies of swearing in. The first one was televised. The second one involving these Accused was not, as A3 indicates in his interview statement.

[37] There was therefore no finding of fact in the earlier judgment that these four Accused had taken part in a swearing in ceremony or that that ceremony, the second, had even taken place. Of the first ceremony most people in Fiji at this tense time would have been aware from watching their TV sets. That viewing would not deprive any such TV watcher of an impartiality sufficient to disqualify him or her from judging whether any of these Accused were participants in a second ceremony and of being able to consider impartially whether any of them had been proven guilty on all elements of the charge.

[38] In any event in this application, Mr Khan puts in the caution interview statements of his clients A1, A2 and A3. From these interviews it is clear all four Accused persons admit taking part in the taking of the oaths of ministerial office. They give varying explanations for this conduct, which explanations will no doubt feature in their defences.

[39] The two cases not only do not have the same parties, they do not deal with the same issues or evidence. To have presided over a constitutional case does not thereafter preclude a judge from sitting on a wrongful swearing-in case, which formed a small fragment at the corner of the constitutional picture. This is not an appropriate case for recusal and I decline to disqualify myself.

Transfer

[40] The simple answer to Mr Khan's allegation that it will be difficult to obtain assessors in Suva who were not affected by the 2000 coup is to state the obvious. Everyone in Fiji was affected in some way by the coup. Some may have benefited, most will have lost something. Even those who believe in violent means for change will have endured a painful passage in order to attain a better end.

[41] Mr Kaitani in his affidavit says he cannot receive a fair trial in Suva because of the curfew orders, restrictions on movement, the closure of schools, businesses, government departments, court houses and transport systems and the

fact that people were seriously affected by the coup. He says persons may have been directly or indirectly affected by the actions of George Speight and thus be aggrieved parties.

[42] Some of this notoriously affected Lautoka and the Western Division also. There was public debate about the West seceding from the South as shown in the disclosure material and moves made to form a separate Government for the West. There were even impolite anti-Speight placards placed prominently on the main highway, the Queens Road at Nadi.

[43] The question of transfer may be considered either after an application by counsel or by the court of its own motion. It is a question of expediency for the ends of achieving justice. An obvious example would be that of an Accused person charged with rape and murder of two 10-year-old girls in a small country town. An application to transfer the case to another court centre when there is evidence of strong ill feeling towards the Accused is likely to succeed so as to avoid any taint of prejudice and partiality among jurors or assessors.

[44] Necessary directions are given in every trial for the assessors to dispense with sympathy or prejudice in arriving at their opinions. This trial will be no different. I apprehend no special prejudice to the Accused in a Suva trial. I see no advantage in transferring this case to Lautoka for hearing. I decline to order transfer.

Right to consult counsel

[45] In his affidavit A4 says he was interviewed by a police corporal about this charge. He says he was advised of his right to consult a solicitor. He told the interviewer of the solicitor he wanted and the officer telephoned that solicitor. The officer told him that no one answered the phone. Consequently, the Accused agreed to go ahead with the interview without speaking to the solicitor.

[46] He said "in hindsight and in the circumstance abovementioned I sincerely believe that the interviewer neither contacted said solicitor nor advised me of my right to require adjournment of interview pending actual consultation with my solicitor". Mr Rabo says this conduct of the prosecution was in contravention of the Accused's constitutional rights.

[47] In *A K Singh* at 20 the Court of Appeal had said:

> The criminal trial is yet to take place. At that trial the Appellant will have the opportunity of challenging the impugned evidence. Even if the impugned evidence is ruled admissible after a voir dire where the Appellant has called evidence against the admission of the impugned evidence he can still call the latter evidence before the assessors.

and on the timing and procedure of raising such a matter (at 21):

> Fifthly it is simply not correct to treat a mere assertion of a breach of a fundamental right under the Constitution as a matter of law entitling the Appellant to a ruling in a separate proceeding ahead of his criminal trial. There are disputed questions of fact which require resolution in accordance with well established common law procedures. An application for constitutional redress is not a suitable vehicle for the disposal of such issues. The proper forum is the criminal trial.

[48] I decline to deal with the impugned evidence ahead of any voir dire that may be called for during the course of the trial.

Avoidance of statutory time limits

[49] The Accused are charged with an offence contrary to s 5(b) of the Public Order Act (Cap 20). That offence has no time limit set by Parliament within which a prosecution must be commenced. The offence has to be read in this case with s 50 of the Penal Code, a section which deals with treason. Section 54 sets a limit of 2 years within which a prosecution must be brought for treason and allied offences. For the offence in the information here, there is therefore no time limit.

[50] The Accused claim that the present charges are brought against them because of the expiry of the time limit on a possible prosecution for treason. Accused 4 says he was charged on 5 August 2000 for consorting with people carrying firearms and for unlawful assembly. He says the delay in bringing the subsequent public order charge in this case is inexcusable. He points to this prosecution being deliberately delayed. That allegation carrying with it the missing out by the director thereby on the opportunity to charge treason is difficult to accept.

[51] A similar allegation was made in *Seniloli v State* [2004] FJCA 46 (*Seniloli*). The Court of Appeal concluded (at 19):

> the offence charged is separate and distinct from treason and, if it is ever charged on an indictment which also charges treason, it will, per se, not be duplicitous. As a consequence, it is not affected by the time limit on prosecutions for the former.

[52] In this case the Accused were all charged on 2 December 2004, nearly four-and-a-half years after the date of the offences. The Director of Public Prosecutions gives his explanation of the situation that faced his office immediately after the coup or troubles following 19 May 2000. I shall return to that evidence further on.

[53] The Court of Appeal rejected the ground of appeal on this issue. They heard that the s 5 of the Public Order Act charge was not also an act of treason. The court (at 14) upheld Shameem J's ruling where her ladyship had said:

> In this case, it is not established that the evidence in the case will in fact prove the offence of treason. As I see it, an offence under sections 5 or 6 of the Public Order Act is not necessarily a lesser offence in relation to section 50 of the Penal Code … the affidavit of Josaia Naigulevu does not explicitly concede the evidential possibility of laying the more serious offence. If that situation arises, then in accordance with the practice of the Fiji courts and with section 3 of the Penal Code, I adopt the reasoning of the English Court of Appeal in *R v J* [2003] 1 WLR 1590; [2003] 1 All ER 518; [2002] EWCA Crim 2983, and consider that it is not an abuse of process per se, to lay a less serious charge when the time limitation on the more serious charge has expired. Further, I do not consider that the defence has shown, on a balance of probabilities that it would be impossible for the accused to be given a fair trial because a lesser charge had to be preferred.

[54] It was proper to charge "an accused with a less serious charge notwithstanding that the facts which it intends to prove would, if accepted, establish the commission of a more serious crime which includes all the elements of the lesser crime even if the more serious offence could no longer be prosecuted because of a statutory time limit". *R v Saraswati* (1989) 18 NSWLR 143; 47 A Crim R 1 (*Saraswati*).

[55] The Court of Appeal approved both *R v J* [2003] 1 WLR 1590; [2003] 1 All ER 518; [2002] EWCA Crim 2983 (*J*) and *Saraswati*. The decision to lay appropriate charges in these circumstances was one of prosecutional

discretion and responsibility. A stay would only be granted for abuse of process if the court finds that the circumstances would prevent the Accused from receiving a fair trial or that it would be unfair for him to be tried at all: *Seniloli* at 14.

[56] The question to be considered is whether proceeding with the alternative charge involves an affront to the public conscience, is necessarily contrary to the public interest or whether it undermines the integrity of the criminal justice system (*J* at [39]). Similar sentiments were expressed by Lord Steyn in *R v Latif* [1996] 1 WLR 104; [1996] 1 All ER 353; [1996] 2 Cr App R 92 at 101.

[57] Lord Steyn had said:

> the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crime should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means.

[58] The court in *Seniloli* at 16 concluded:

> It is clear to us that the offence under section 5 is a totally different offence from treason both in terms of the actus reus and the mens rea.

[59] In the public order offence, it was not necessary to prove that the Accused intended to commit treason, nor that they intended to be bound by their oaths.

[60] In his affidavit the director referred to the great fear and anxiety that many in the community felt for their personal safety, the extremely heavy burden on his staff and office, the sheer volume of work, its uniqueness and complexity, the attacks on the Rule of Law, the loss of staff, the difficulties also for the police in carrying out investigations, among other significant factors that his office faced in having cases brought before the courts.

[61] Having weighed all relevant matters, I conclude there to be no abuse as a result of the bringing of the public order charges and that a fair trial will be possible.

Abuse of process for delay

[62] The Accused apply for a permanent stay on the ground that there has been excessive delay in the laying of the charges. Since the matter first came to court in December last year there has been no abnormal delay. Some of that time has been taken up trying to ensure legal representation for two of the present Accused. One is concerned therefore with pre-charge delay, a period of four-and-a-half years from May 2000.

[63] In his two affidavits A4 does not refer to any specific prejudice that he has suffered in the mounting of his defence. In his first affidavit A1 refers to the difficulties he and A2 and A3 have had in remembering the names of their witnesses and their whereabouts. Some witnesses presumably are remembered for he said "but we are unable to remember all of them". He also points to the difficulty in remembering the events relevant to the charge, that of course is about the taking of the oath, the swearing in.

[64] Mr Kaitani lists several members of parliament now deceased who he says "would have proven that the allegations against us were not correct". No details are given as to the nature of the evidence that would have been given and to which issue it would have gone in the defence. Other witnesses are listed who are said to have migrated overseas or left the country and others who are also deceased. It is said their evidence "would have persuaded the assessors and the

court that the allegations against us were only suspicion". Again the nature of the evidence from those witnesses was not provided.

[65] Of course, in a criminal trial no Accused has to prove anything. He has no obligation to give evidence or to call witnesses. But from their statements it would appear the Accused had each named persons who were present at the oath taking ceremony who are not deceased and who might be able to give evidence to assist the defence.

[66] In *Apaitia Seru v State* [2003] FJCA 26 (*Apaitia Seru*), the court quashed the Accused's convictions because of inadequacies in the summing up. Through the courts the case had had a delayed and chequered history. The trial judge himself has said "the administration of the case had not been a happy one". This is not the case here. The issue is the pre-charge delay.

[67] As was said by the Court of Appeal in *Seniloli*, the facts and the charge here though serious are uncomplicated. This is not a complicated fraud case or a case alleging several different incidents of sexual offending which are alleged to have occurred many years ago. The allegation concerns an incident of short duration, the simple oath taking. I consider the delay in charging the Accused to have caused minimal prejudice: *Martin v Tauranga District Court* [1995] 2 NZLR 419; *R v Morin* (1992) CR (4th) 1.

[68] Though the courts have long recognised a tension between the Accused's interests and those of the community, it has been emphasised that "there was a societal interest in bringing to trial those Accused of offending against the law": *Apaitia Seru* at 9.

[69] Not only has Fiji fewer institutional resources than more sophisticated countries, the enforcement authorities following the dislocations and disruptions of May 2000 were clearly fractured and overburdened. As the director has made plain in his affidavit the tasks placed on his office and on the police at such a time were overwhelming. Other jurisdictions would have little understanding of such extraordinary constraints. There were understandable difficulties in investigating serious cases arising from the events of 2000.

[70] Overall, and weighing the issues for and against I come down on the side of the need for this case to be allowed to proceed. I therefore reject the application for stay.

[71] This ruling, together with the preceding submissions in court, are not to be published until the conclusion of the case.

Application dismissed.