**STATE v APISAI TORA and 12 Ors (HAA0043 of 2005L)**

HIGH COURT — APPELLATE JURISDICTION

CONNORS J

5, 19 September 2005

**Criminal law — offences — unlawful assembly — blocking a highway — whether offence committed — unsworn evidence — Constitution ss 27, 31 — Penal Code (Cap 17) ss 86, 87.**

Several prosecution witnesses alleged that hundreds of people, including the Respondents, converged to take over a checkpoint using a logging truck and blockaded a highway causing the army to retreat. People put sandbags and sugarcane across the road and some had red armbands on their heads. The Respondents were charged with unlawful assembly and pleaded not guilty in the Magistrates Court. The Respondents gave no evidence as to the admissibility of the caution interviews or charge statements but the interviews or statements were tendered and admitted into evidence during the trial. The Magistrates Court acquitted the Respondents. The ruling addressed unsworn evidence, unlawful assembly, observations of prosecution witnesses, s 31 of Constitution and criticism of intervening officers without dealing with confession statements and procedure in *Vinod Kumar v State* (*Vinod Kumar*).

The State appealed the decision challenging the learned magistrate's acquittal order. The issues for consideration were whether: (1) the Respondents committed the offense of unlawful assembly; and (2) the learned magistrate failed to deal with the confession statements and the procedure in *Vinod Kumar*.

**Held** — (1) The Respondents committed the offence of unlawful assembly. Section 31 of the Constitution does not entitle persons to assemble in contravention of s 86 of the Penal Code. The very words of s 31 enable and anticipate laws that limit the right to assemble in the interests of public safety, public order or for protecting the rights and freedoms of others. The blocking of a major highway by 100–200 people and the putting of sandbags and sugarcane across the road created issues of public safety.

(2) The learned magistrate failed to deal with the confession statements and the procedure in *Vinod Kumar* where an accused may give evidence as to the admissibility of the statement without losing the right to make an unsworn statement from the dock or to decline to give evidence in the case generally.

Appeal allowed.

**Cases referred to**

*Beatty v Gillbanks* (1882) 9 QBD 308; [1881–85] All ER Rep 559; *R v Chief Constable of Devon; Ex parte Central Electricity Authority Generating Board* [1982] QB 458; [1981] 3 All ER 826, cited.

*Field v Metropolitan Police Receiver* [1907] 2 KB 853; [1904–07] All ER Rep 435; *Gyan Singh v Reginam* [1963] 9 FLR 105; *Harrison v Duke of Rutland* [1893] 1 QB 142; [1891–94] All ER Rep 514; *Prem Chand Singh v Reginam* [1965] 11 FLR 119; *State v Iosefo Sucutuiqaqa* [2001] FJHC 96, considered.

*Vinod Kumar v State* [2001] FJCA 15, followed.

*Abdul Sattar v Reginam* [1960–61] 7 FLR 14; *State v Josaia Tamanikaibau* [2003] FJHC 136; *State v Tamanikaibau* [2003] FJHC 136, not followed.

*K. Tunidau* for the State

*I. Khan* and *F. Koya* for the Respondents

**Connors J.** The State appeals an order of the acquittal of the Learned Magistrate, S M Shah, on the 4 November 2004.

The Respondents were charged with Unlawful Assembly.

*Statement of Offence*

UNLAWFUL ASSEMBLY: Contrary to ss 86 and 87 of the Penal Code, (Cap 17).

*Particulars of Offence*

APISAI TORA, PAULIASI NIUSAMA, PENIASI QORO, ILIESA MAWA, VILIAME RAKULI, PAULA SAUKURU, NAPOLIONI VASU, MOSESE TUISA, PENI RAICEBE, VELA TAWAKE, PENIASI QORO, ANANAIASA MOCEI, APENISA NAYATE, EMOSI QAUNITOGA, ACA TUIGALOA and KINISIMERE QORO, between the 13th day of July 2000 and 14th day of July, 2000 at Sabeto, Nadi in the Western Division being assembled at the Queens Road and Sabeto junction to carryout a common purpose namely to take over the check point that was guarded by the FIJI MILITARY FORCE for the maintenance of security in the country thus conducting themselves in a manner as to cause the persons in the neighbourhood and the officers of the FIJI MILITARY FORCE reasonably to fear that the foresaid APISAI TORA, PAULIASI NIUSAMA, PENIASI QORO, ILIESA MAWA, VILIAME RAKULI, PAULA SAUKURU, NAPOLIONI VASU, MOSESE TUISA, PENI RAICEBE, VELA TAWAKE, PENIASI QORO, ANANAIASA MOCEI, EMOSI QAUNITOGA, ACA TUIGALOA and KINISIMERE QORO will commit breach of the peace.

The grounds of appeal are:

(A) The learned magistrate erred in law in failing to direct himself in terms of the decisions in *Abdul Satar v State* [1960–61] 7 FLR 14 and subsequent decisions affirming it including *State v Josaia Tamanikaibau* [2003] FJHC 136 both of which were binding upon this magistrate and clearly declare the law of Fiji as to the elements of the offence of unlawful assembly — contrary to the law as found and applied by the magistrate.

(B) In as much as the learned magistrate has directed himself that the law of Fiji requires that the conduct of the assembly must be such as to give firm and courageous persons in the neighbourhood some reasonable ground to apprehend a breach he has misdirected himself.

(C) His Worship erred in law by applying inappropriate tests to the question whether there had been an unlawful assembly:

- (a) Reference is made at 20 to a passage from *R v Chief Constable of Devon; Ex parte Central Electricity Generating Board* [1982] QB 458; [1981] 3 All ER 826 at 834–5 in which the elements being discussed were of riot and not unlawful assembly.
- (b) Reference is made, without criticism, to a defence submission to the effect that it must be proved that D intended to use or to abet the use of violence; or to do or abet acts which he knows will be likely to cause a breach of the peace. This does not state the law of Fiji. There is no requirement to prove any intention to use violence or force. In the absence of any critical commentary the magistrate appears to have accepted this as a correct proposition of law.

(c) The magistrate accepted as representing the law of Fiji a proposition set out at 21 of the judgment from defence counsel and in doing so referred to a decision of *Beatty v Gillbanks* (1882) 9 QBD 308; [1881–85] All ER Rep 559. In light of the decisions *in Abdul Satar v State* and *State v Josaia Tamanikaibau* [2003] FJHC 136, the cited proposition clearly does not state the law of Fiji.

(D) The magistrate appears to have been significantly influenced in his findings of guilt by irrelevant considerations including:

(a) extensive reference to matters having a bearing only upon the admissibility of caution interviews;

(b) he took into account in ways he did not specify the fact that some witnesses (not specified) did not answer some questions (not specified). Without particularity, this cannot indicate more than that the magistrate has not addressed the evidence in a proper manner and has made findings of fact upon bases which are lacking in detail or specificity and on that account cannot be accepted.

(c) He has allowed irrelevant considerations to have a bearing upon the determination of the guilt or innocence of the accused including claims of non-conformity to some police standing orders. In the circumstances, it is seriously concerning that this magistrate has proceeded upon bases which are irrelevant and inappropriate.

(E) The magistrate appears to have misdirected himself as to the onus and standard of proof in that he has engaged himself in an extensive consideration of the tests and standards to be applied upon a non case submission in a context when this was not in issue in the final judgment. There arises a significant concern that the magistrate has misdirected himself as to the appropriate law.

(F) The decision is against the evidence and the weight of the evidence in that no reasonable tribunal of fact properly instructed could have failed to have found that the elements of the offence had been established and that each accused was guilty of the offence charged.

All 13 Appellants pleaded not guilty and the trial before the learned magistrate commenced on the 6 April 2004.

All Respondents were interviewed under caution and all interviews and charged statements were tendered and admitted into evidence in the trial.

PW-2, Sitiveni Tukaituraga, the commanding officer of the Army Unit based at the CAAF Compound, Namaka in July 2000, gave evidence of being in charge of a military checkpoint at Sabeto junction on the Queens Road. On 12 July 2000 at about midnight, following receipt of intelligence, he went to the checkpoint. A logging truck approached the checkpoint at a speed of over 60 kmph and 100 people "swamped in at the checkpoint". A maroon Prado of Apisai Tora drove "towards us. It stopped 5 metres from us". People put sand bags across the road and some people had red arm bend on their heads.

When he asked Tora what he wanted to do he said "… came to take over the checkpoint … to show support for Tui Vuda as GCC was sitting. Not in anyway to show support for Speight". He then gave evidence of withdrawing his men. He said:

> Before withdrawal. I feared for men's life.

> A statement made by Captain Tukaituraga on the 8 September 2000 was tendered as Exhibit D-1. It was argued that it was a prior inconsistent statement as evidence was given that matters not in that statement.

Despite the strenuous cross-examination by Mr Khan for the Respondents, it would appear from the record that rather than being inconsistent, there was additional information given to the court by the witness, that was not contain in the statement. It is clear from the evidence given in the trial and the statement that 100 were in the logging truck or "10 wheeler truck" converged on the checkpoint and blockaded the highway and that the army retreated due to the fear that the commanding officer had for his men.

Aporosa Saturu, a former resident of Sabeto for over 60 years, was a soldier in July 2000. He gave evidence of being at a meeting at the house of Peniasi Qoro to take over the checkpoint. While some of his evidence is inconsistent with the prior statement made to the police, the fact of the meeting and its purpose and that he feared the large number of people and the way the spoke appears not be inconsistent.

The evidence of Nacanieli Lomani, Executive Officer for the Commissioner Western, confirmed that no permit was issued for the assembly. His evidence as to the meaning and a fact of s 31 of the Constitution of the Fiji Islands is of no benefit as this is a matter for the court.

I further soldier, Mesake Motu, gave evidence of being the duty manager of the Sabeto checkpoint on the 12 July 2000. He said that over 200 people converged on the checkpoint. That a white 10-wheeler truck full of people came and that he "thought not safe to stay there because of what happened at Parliament". He also gave evidence of Mr Tora's vehicle speeding to the checkpoint. He said sandbags blocked the highway so no traffic could go and that the way they arrived was not peaceful.

Seci Lagiloa, an army officer based at Namaka in July 2000 was at the checkpoint at Sabeto when about 200 people came towards him and him and other soldiers stopped, he says, they were singing and shouting and that he "was fearful of our safety". They blocked the road and the truck carrying people came to the checkpoint.

The learned defence counsel in cross-examination that he made a prior statement to police that did not refer to the manner in which Mr Tora's vehicle arrived.

Tifayat Hussein, a resident of Sabeto said he was told to stay quiet but that he was not frightened even though he told the police that he was frightened. His evidence is confused in that he oscillates between saying he was frightened and that he was not frightened.

Muni Ratnam lived at Sabeto junction and opened his door after hearing a noise and saw 150–200 people on the road. Motor vehicles could not pass. He says he was asked for money for grog. People were sitting in the road. There were sandbags and sugarcane on the road. Some minor inconsistencies in a prior statement to the police were highlighted in cross-examination.

The record of interview and charge statements of Apisai Tora, Viliame Rakuli, Paula Saukuru, Pene Raicebe, Peniasi Qoro and Kinisimere Qoro were admitted by consent as Exs 1–12.

At 49 of the record of the Magistrates Court, it is recorded:

> Mr Khan: from now on we object to all interviews to all witnesses as did not comply with Fiji Constitution.

At 50 it is recorded:

> Mr Khan: Object to it. But can be tendered now and later we will challenge it in terms of *Vinod's* case. We give notice now of this.

I understand the reference to "*Vinod's* case" to be a reference to *Vinod Kumar v State* [2001] FJCA 15. The Fiji Court of Appeal at 2 of the judgment sets forth the procedure laid down by the Chief Justice to be followed in Magistrates Courts in lieu of the trial within a trial.

> The direction went on to provide a procedure which was to be followed in cases where previously a trial within a trial might have been held. This provides that the prosecution is to call all its witnesses. After all witnesses for the prosecution have been called the defendant is to be given the opportunity to give evidence if he wishes exclusively on the taking of the caution statements. He can then be examined and cross-examined only on matters concerning the taking of the statement. The defendant may also call witnesses to give evidence before the Court exclusively on the taking of the caution statement. This procedure contains an important safeguard for an accused person. An accused may give evidence as to the admissibility of the statement without losing the right to make an unsworn statement from the dock or to decline to give evidence in the case generally.

The caution interview of Peniasi Saubolo was tendered to the court by PC 1758 Meli, interviewing officer and was admitted as Ex 13. The officer attended the interview of Vela Tawake (Ex 14) and Apenisa Nayate (Ex 15).

The officer was cross-examined as to issues going to the voluntariness of the interview and alleged breaches of s 27 of the Constitution of the Fiji Islands.

PC 340 Delai Tikolomaloma gave evidence of interviewing Napolioni Vasu and tendered the caution interview which was admitted as Ex 16. He was similarly cross-examined as to breaches of s 27 of the Constitution of the Fiji Islands.

DC 942 Manoa gave evidence of interviewing Anasa Mocecama and tendered the caution interview which was admitted into evidence as Ex 17. He was then similarly cross-examined.

Lastly Cpl 727 Senitiki gave evidence of having interviewed Mosese Tuisa and tendered the caution interview which was admitted as Ex 18 and he was then similarly cross-examined. The charge statements of those accused were admitted as Exs 19–30.

No evidence was given by any of the Respondents as to the admissibility of the caution interviews or charge statements.

A submission is made by counsel for the Respondents in the written submissions in support of a no case to answer:

> The police officers who recorded the caution interview of those accused who made admissions, recorded the said interview in breach of the Fiji Constitution and under the Common Law Rights of the detained and arrested persons. The Court should rule this statements as being inadmissible.

No ruling was made by the learned magistrate. When he ruled on the no case to answer submissions, he merely said:

> Ruling
> This ruling is re no case to answer.
> I have considered all submissions.
> I find that there is a case to answer.

Following this ruling, the Respondents all made unsworn statements.

Apisai Tora said:

> I deny all the allegations against me.
>
> I did not have any weapons whatsoever when soldiers had guns.
>
> Whatever I did was exercising my constitutional rights to assemble and demonstrate peacefully with others.
>
> My actions did not commit any breach of peace.

All other Respondents merely agreed or adopted this statement.

A further submission was made by counsel for the Respondents titled "Accused's Submissions Beyond Reasonable Doubt". That submission is relevantly:

> CAUTION INTERVIEWS OF PENIASI SABOLO, NAPOLIONI VASU, MOSESE TUISA, VELA TAWAKE, ANAIASA MOCEI, APENISA NAYATE AND ACA TUIGALOA were challenged by the Counsel for the Accused on the grounds that they were obtained in breach of Fiji Constitution and as such was not voluntary.
>
> The police officers gave evidence and described how the caution interview was obtained. They admitted they did not comply with the Provisions of Fiji Constitution.
>
> We submit with respect that this Honourable Court should not allow the caution interview as evidence since it was obtained in breach of Fiji Constitution."

**Judgment of the learned magistrate**

On 4 November 2004, the learned magistrate delivered a 24-page judgment which resulted in all Respondents being acquitted.

For some inexplicable reason, the first 17 pages of the judgment deal with "No Case to Answer" notwithstanding that he had ruled on this aspect to the trial on 17 September 2004.

The remaining 7 pages might be summarised as addressing: unsworn evidence; "unlawful assembly"; observations of prosecution witnesses; s 31 of the Constitution and criticism of the interviewing officers. It is regrettable that the learned magistrate was not referred to the authorities reflecting the law in this country as to unlawful assembly.

**The law**

Section 86 of the Penal Code provides:

> When three or more persons assemble with intent to commit an offence, or, being assembled with intent to carry out some common purpose, conduct themselves in such a manner as to cause person in the neighbourhood reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such assembly needlessly and without any reasonable occasion provoke other persons to commit a breach of the peace, they are an unlawful assembly.
>
> It is immaterial that the original assembling was lawful if, being assembled, they conduct themselves with a common purpose in such a manner as aforesaid.

The section has been considered by the Supreme Court of Fiji (as it then was) in *Abdul Sattar v Reginam* [1960–61] 7 FLR 14. Lowe CJ said at 15:

> It is clear from that section that the prosecution must first show —
>
> (a) that three or more persons assembled;
> (b) that they assembled with intent to carry out some common purpose; and
> (c) that the persons assembled conducted themselves in such a manner as to cause persons in the neighbourhood reasonably to fear that they would commit a breach of the peace.
>
> There is an alternative to (c), namely that persons in the neighbourhood are caused reasonably to fear that the persons assembled will by such assembly, needlessly and without reasonable occasion, provoke other persons to commit a breach of peace.

At 17 His Lordships:

> The law recognizes no right of public meeting in thoroughfares, which are dedicated only for public passage and re-passage. *Harrison v Duke of Rutland* [1893] 1 QB 142; [1891–94] All ER Rep 514.
>
> In view of the very large assembly it is reasonable to suppose that when those so assembled conducted themselves in concert, and noisily, people in the neighbourhood would fear that they would commit a breach of the peace. That also is a reasonable, in fact an inescapable, inference to be drawn from the evidence. A man is presumed to have intended the natural and probable consequences of his act. That, as stated in Russell, 37 "is a presumption adopted in the interests of the administration of justice". Although a crowd might not, and possibly at times would not, intend that persons in the neighbourhood would be put in fear, a similar principle applies in that the trial court is entitled to conclude that natural and probable consequences flow from the event in riot and similar cases.

After referring to *Field v Metropolitan Police Receiver* [1907] 2 KB 853; [1904–07] All ER Rep 435, the Chief Justice at 18 said:

> I am, with the greatest respect, in complete agreement with the dictum and would add that under the law as at present in force in Fiji, if evidence shows that events took place which, of their very nature, must have put people in fear or terror it is not only superfluous but also unnecessary to call direct evidence of the fact of a natural consequence of those events so far as fear in or the terror of the public is concerned.

The issue was most recently considered by Madam Justice Shameem in *State v Josaia Tamanikaibau* [2003] FJHC 136. At 9 of the judgment, Her Ladyship referred to her earlier decision in *State v Iosefo Sucutuiqaqa* [2001] FJHC 96 where at 14 she had said:

> An unlawful assembly becomes unlawful (even if the purpose of the assembly was originally lawful) when the persons assembled (not necessarily the accused persons as long as they were part of the assembly) conduct themselves in a manner that people in the neighbourhood will reasonably anticipate a breach of the peace.

Her Ladyship at 10 referred to *R v Caird* (1970) 54 Cr App Rep 499 at 505 where Sachs LJ said:

> It is the law — and, indeed, in common sense, it should be case — that any person who actively encourages or promotes an unlawful assembly or riot, whether by words, by signs or by action, or who participates in it, is guilty of an offence which derives its great gravity from the simple fact that the persons concerned were acting in numbers and using those numbers to achieve their purpose.

Counsel for the Respondents submitted that s 31 of the Constitution of the Fiji Islands gives a right to the Respondents to assemble. Section 31 provides:

> (1) Every person has the right to assemble and demonstrate with others peacefully.
>
> (2) A law may limit, or may authorize the limitation of, the right to freedom of assembly;
>
> (a) in the interests of national security, public safety, public order, public morality, public health or the orderly conduct of national or municipal elections;
>
> (b) for the purpose of protecting the rights and freedoms of others; or
>
> (c) for the purpose of imposing reasonable restrictions on the holders of public offices in order to secure their impartial service;
>
> but only to the extent if the limitation is reasonable and justifiable in a free and democratic society.

## Considerations

Section 31 of the Constitution does not entitle persons to assemble in contravention of s 86 of the Penal Code. The very words of s 31 enable and anticipate laws that limit the right to assemble in the interests of public safety, public order or for protecting the rights and freedoms of others.

The blocking of a major highway by 100–200 people, sandbags and sugarcane must without more create issues of public safety, public order and the need to protect the rights and freedoms of others.

## The evidence

The learned magistrate's failure to deal with the confession statements and his failure to follow the procedure set down by the Chief Justice and set forth in *Vinod Kumar v State*, leaves no option but to exclude Exs 13–18 from consideration. Counsel for the Respondents submits that "all the prosecution witnesses admitted that the statements they have given to the police were inconsistent that they have given in court".

The Fiji Court of Appeal in *Prem Chand Singh v Reginam* [1965] 11 FLR 119 considered the question of prior inconsistent statements in a context which is best summarised at 122:

> With regard to the question of credibility the argument of counsel for the appellants is founded almost entirely on the ground that they had made previously inconsistent statements, in some cases on oath, and that their evidence should properly have been rejected entirely.

At 126 the court said:

> At the same time it is still a matter for the Assessors in their advice to the Judge, and for the learned trial Judge in his judgment, to determine just what credence can be given to the evidence of the witnesses concerned and just what weight can be placed upon it. This aspect of the matter was examined by this Court in *Gyan Singh v Reginam* [1963] 9 FLR 105. In the course of that judgment it is stated:
>
> > It is the duty of the trial Judge to warn the Assessors, and to keep in mind himself, that it is dangerous to accept sworn evidence which is in conflict with statements previously made by the same witness; or, at least, that such evidence should be submitted to the closest scrutiny before acceptance. It is, however, still the duty of the Assessors, and of the Judge himself, after full attention has been paid to this warning, to determine whether or not the evidence given before them in Court at the trial is worthy of credence and, if so, what weight should be attached to it.

When one closely scrutinises the evidence there is an abundance of evidence that they were more than three people assembled (100–200) shouting with some wearing red headbands with a common purpose to take over the checkpoint at Sabeto. The assembled group blocked the highway to traffic and "of their very nature, must have put people in fear or terror" making it "unnecessary to call direct evidence of the fact of natural consequence of those events so far as fear in or the terror of the public is concerned".

The unsworn statement of Apisai Tora, adopted by the other Respondents was:

> I deny all the allegations against me.
>
> I did not have any weapons when soldiers had guns.
>
> What I did was exercising my constitutional rights to assemble and demonstrate peacefully with others.
>
> My action did not commit any breach of the peace.

There appears to me to be abundance of evidence "worthy of credence" and of sufficient weight to be satisfied beyond reasonable doubt that the Respondents committed the offence with which they stood charged.

**Conclusion**

I uphold each of the grounds of appeal.

It follows therefore that the appeal must be allowed, the order of acquittal quashed and in lieu thereof I convict each of the Respondents of unlawful assembly. The accused are each to be sentenced by this court.

*Appeal allowed.*