TEVITA V QAUQAU BUKARAU and 4 Ors v STATE (HAA0101 of 2005S)

HIGH COURT — APPELLATE JURISDICTION

SHAMEEM J

4, 18 November 2005

Criminal law — offences — unlawful assembly — consorting with people carrying firearms — assembly during armed takeover of parliament — adjournments in trial and charges amended — appeal against conviction on several grounds — Criminal Procedure Code s 123 — Emergency Decree No 4 2000 ss 9, 10(1), 10(2), 10(3), 25, 342 — Penal Code (Cap 17) ss 86, 87.

The Appellants were charged after amendments with the offences of consorting with people carrying firearms under ss 10(2) and 25 of the Emergency Decree No 4 of 2000 (the decree) and unlawful assembly pursuant to ss 86 and 87 of the Penal Code (Cap 17) (the Code). After a number of adjournments, the trial commenced, the charges were amended and the pleas were retaken. During an armed takeover of the parliament by five men led by George Speight, in which parliamentarians where kept hostage for 56 days, the State asserts all the Appellants except the third Appellant (A3) were present. The first and second Appellant (A1 and A2 respectively) were always present at the meetings and the fifth Appellant (A5) was to be sworn in as a minister in a replacement Cabinet. Hundreds of people marched out of the parliament, and there were other reports of criminal offending and unlawful activities.

The Magistrate's Court found all the Appellants guilty as charged and they were convicted. The issue of the validity of the decree and that the charges were defective were not raised. After hearing mitigation, the learned magistrate sentenced A1, A2 and the fourth Appellant (A4) to two-and-a-half years' imprisonment, A3 to 2 years' imprisonment and the A5 to 15 months' imprisonment. The Appellants appealed against their convictions and sentences and challenged whether consorting with people carrying firearms and unlawful assembly was committed.

The issues were whether the learned magistrate erred in: (1) accepting evidential matters of judicial notice; (2) convicting on count 1, when the Appellants were not a party to the actual takeover of the parliament; (3) his approach as to the elements of the offence under s 10(1) of the decree; (4) that there was insufficient evidence that each Appellant consorted in fact; (5) that there was no evidence of A5's presence in the parliament; (6) holding that the decree was invalid under the Constitution; (7) that during the trial, the Appellants did not raise first the question of the validity of the decree; and second the defect in the charge, before the trial magistrate; (8) that there was no evidence that A1, A2 and A5 were present at the unlawful assembly; and (9) finding that the Appellants were guilty when they were positively assisting in resolving the national crisis.

The Appellants were originally represented by counsel. However, at the appeal's hearing and with the Appellants' consent, the counsel withdrew, leaving A1 to make submissions for all the Appellants.

Held — (1) There was an unlawful assembly since there was evidence of fear and unlawful activities in the surrounding areas committed by various members of the assembly. The first and second prosecution witness (PW1 and PW2 respectively) testified that there was: (1) a march through Suva town; (2) an armed takeover of the parliament; (3) a hostage situation for 56 days; and (4) a large crowd of people gathered in the parliament. The defence did not dispute these events. There was no need to rely on judicial notice and the brief reference to it in the judgment was peripheral to the issues.

(2) People who rushed to the parliament after the treason was committed, to support it or to add numbers to the people already gathered there were part of an unlawful assembly. Captive parliamentarians were held in the parliament for 56 days. The evidences of PW1,

PW2, PW3 and PW4 established that the unlawful event made the gathering at the parliament an unlawful assembly to perpetuate an unlawful purpose.

(3) There are two negative averments under s 10(1) and (3) of the decree, namely: (1) without lawful excuse; and (2) once the prosecution has proved the consorting as a matter of fact. The words in circumstances which raise reasonable presumption in s 10(1) is not a negative averment, but a requirement of the consideration of evidence on the basis of which the court may make reasonable inferences. The learned magistrate correctly directed himself on the elements of the offence and on the negative averments. There was a reasonable presumption of acts prejudicial to public security because of the close connection between the carrying of arms and the unlawful takeover of the government.

(4) The testimonies of PW1, PW2, the third, fourth and eleventh prosecution witness (PW3, PW4 and PW11 respectively) established the presence of each Appellant in the parliament during the 56-day hostage situation. A1's radio interview also established that there were armed men in the parliament. The Appellants' unsworn statements did not deny their visits to the parliament and their motives were irrelevant to the conviction.

Appeal dismissed.

Cases referred to

Clifford-Nelson (1977) 65 Cr App Rep 119, applied.

Christina Doreen Skipper v Reginam [1979] FJCA 6; *Daniel William Brown* (1971) Crim App Rep 478; *Director of Public Prosecutions v Bhagwan* [1972] AC 60; [1970] 3 All ER 97; *Director of Public Prosecutions v S Digambar* (Unreported, Supreme Court of Mauritius, Record No 20477, March 1978); *Livai Nagera v State* [2001] FJHC 75; *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 at 732; [1968] 3 All ER 561 at 579; *Mitchell v Director of Public Prosecutions* (1986) LRC (Const) 35; *R v McVitie* [1960] 2 QB 483; [1960] 2 All ER 498; (1960) 44 Cr App Rep 201; *R v Petrie* [1961] 1 WLR 358; [1961] 1 All ER 466; *R v Power* (1977) 66 Cr App Rep 159; *R v Yule* [1964] 1 QB 5; [1963] 2 All ER 780; (1963) 47 Cr App Rep 229; *Senitiki Vulavou v State* [2005] FJHC 398; *State v Apisai Tora* [2005] FJHC 535; *State v Apisai Tora*, cited.

Abdul Sattar v Reginam [1960–61] 7 FLR 14; *Chandrika Prasad v Republic of Fiji Civil Action* [2000] FJHC 121, considered.

T. V. Q. Bukarau for the Appellants

W. Kuruisaqila for the State

Shameem J. This is an appeal against conviction and sentence. The Appellants were charged (after amendments) as follows:

FIRST COUNT

Statement of Offence

CONSORTING WITH PEOPLE CARRYING FIREARMS: Contrary to Sections 10(2) and 25 of Emergency Decree No 4 of 2000.

Particulars of Offence

TEVITA VAKAYARATABUA QAUQAU BUKARAU, METUISELA MUA, RUSIATE KOROVUSERE, VILIAME SAUSAUWAI, ERONI LEWAQAI and JOJI BAKOSO between 19th day of May and 27th day of July 2000, at Suva in the Central Division, were seen consorting with people carrying arms and ammunition.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

TEVITA VAKAYARATABUA QAUQAU BUKARAU, METUISELA MUA, VILIAME SAUSAUWAI, ERONI LEWAQAI and JOJI BAKOSO, between 19th day of May and 18th day of July 2000, being assembled at Parliament Complex in Suva in the Central Division, with intent to carry out a common purpose, conducted themselves

in a manner as to cause the persons in the neighbourhood reasonably to fear that the aforesaid TEVITA VAKAYARATABUA QAUQAU BUKARAU, METUISELA MUA, VILIAME SAUSAUWAI, ERONI LEWAQAI and JOJI BAKOSO will commit a breach of the peace.

THIRD COUNT

Statement of Offence

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

Particulars of Offence

TEVITA VAKAYARATABUA QAUQAU BUKARAU, METUISELA MUA between 19th day of July and 27th day of July 2000, being assembled at Kalabu Primary School in the Central Division, with intent to carry out a common purpose conducted themselves in a manner as to cause the persons in the neighbourhood reasonably to fear that the aforesaid TEVITA VAKAYARATABUA QAUQAU BUKARAU and METUISELA MUA will commit a breach of the peace.

The trial

The charges were filed in July 2001. Pleas were taken on 19 July 2001. Thereafter there were many adjournments for disclosure, for non-appearance of one or other of the Appellants, for amendment of the charges, for an application to withdraw as counsel and for the unavailability of the magistrate.

The trial finally commenced on 23 March 2004. The charges were again amended and pleas retaken.

The evidence led by the prosecution was that on 19 May 2000, there was an armed takeover of parliament by five men led by George Speight. One of the men fired a gun in the parliamentary chambers, during the takeover. The parliamentarians were escorted out of the chambers. Some were handcuffed. At 2 pm on the same day, one of the Parliamentarians Leo Smith, attended a meeting with George Speight. The first Appellant (A1) and the second Appellant (A2) were present at the meeting. The Constitution was purportedly abrogated by Speight, at this meeting. The parliamentarians were kept hostage thereafter for 56 days. During this period of time, parliament was guarded by armed guards with balaclavas over their heads. In the 56-day period, A1, A2, fourth (A4) and fifth (A5) Appellants were present. According to William Aull (PW2) all Appellants "were hanging around parliament all the time in 56 days".

There was also evidence led that the meetings conducted in the parliamentary offices were attended in the first 2 days after the takeover, by George Speight and the A1 and A2. The A5 was apparently to be "sworn in" as a minister in a replacement Cabinet. There was also evidence that the A2 gave instructions to one Alipate Lee (PW4) a construction works businessman, to construct the building of temporary shelters in parliament sometime after the takeover. The A2 paid PW4 a deposit for the shelter at the gates of parliament.

On 27 May 2000, there was a military checkpoint at Vuya Road. At 11am about 400 people marched out of parliament, singing and shouting. Some of them had guns. They fired shots. One man, identified as Viliame Tautani, was firing shots from an M16 machine gun. The soldiers at the checkpoint were shocked and frightened. They were forced to withdraw to the Suva Grammar School. In the course of the incident, three people were shot and injured, including two soldiers. A police checkpoint at Ratu Sukuna Road was also dismantled by the crowd, forcing the police officers to take cover from the shooting. In the entire period of the hostage-taking and the incidents in parliament, there were many reports of criminal offending in the Veiuto, Muanikau and Nasese areas. The offenders came from the crowds gathered at parliament. Some homes had to be

vacated by their occupants. Television footage, taken on or immediately after 19 May 2000, showed some of the Appellants in parliament at a press conference with Speight. At one point, as Speight walked away from the meeting, the A1 walked with him. There was objection to the admissibility of the taped footage, but the learned magistrate ruled that it was admissible and of probative value. There was evidence of a radio interview with the A1. The transcript of the interview purported to explain the circumstances of the incident of 27 May. Part of the transcript read:

> Soldiers were sighted by some women who were here with us at the parliamentary complex and they alerted our sentries here who reacted when they saw that the soldiers were there. Mostly shouting telling them that they should move away from the fence line. What we should remember that both parties were armed and incident like that are not treated lightly when you begin to see armed persons outside your fence line. Soldiers have come too close for comfort if I can put it that way and as the result some of the boys ran out just to yell at them so that they can move away from our fence line.

At the end of the 56 days, in July 2000, a bus took the people in parliament, to the Kalabu Fijian School. It was a gathering for the "qusi ni loaloa" or a celebration to thank George Speight for the indigenous cause. The A1 and A2 were present at the gathering. Some members of the group took fish from fishermen at the Laqere Bridge, without paying for it and by using threats to kill the fish vendors.

On a submission of no case to answer, the third accused Rusiate Korovusere, was acquitted because of insufficient evidence linking him to count 1. There was a case to answer against the remaining Appellants. All the Appellants gave unsworn evidence. The A1, a lawyer and former army officer, said that he was involved with negotiations to resolve the crisis. He said that he was party to the Muanikau Accord, which led to the clearing of parliament and that he did not know that there were arms held in parliament.

The A2 said that he was not part of the armed takeover of parliament and was not in parliament for the whole of the 56 days. He said his only role was to restore law and order in parliament and that he had a role in negotiating a solution with the military.

The third Appellant (A3), (the fourth accused) was referred to at the trial as a doctor. It is not clear whether in fact he had any medical qualifications. Certainly, he did not refer to any in his unsworn evidence. He said that he was in the march which led to parliament on 19 May and that he only entered parliament "out of curiosity". He thereafter helped at the dispensary with two nurses, on a daily basis. He said that there were daily crowds of thousands of people in parliament.

The A4 said that he was in parliament after 19 May but that he did not know if anyone held arms there. The A5 said he was only in parliament for half an hour and saw no arms. He said he was arrested at Kalabu.

Several witnesses, all employees at Q B Bale and Associates, gave evidence that on 19 May 2000, the A1 was at work at the office. Semi Voliti, law clerk of the same office, gave evidence that the A1 remained at the office until 6 pm on 19 May. That was the defence case.

Judgment was delivered on 27 April 2005. The learned magistrate found all the Appellants guilty as charged and convicted them. After hearing mitigation, he sentenced the A1 to a total of two-and-a-half years' imprisonment, the A2 to two-and-a-half years' imprisonment, the A3 to 2 years' imprisonment, the A4 to two-and-a-half years' imprisonment and the A5 to 15 months' imprisonment.

They now appeal against these convictions and sentences. Their appeal grounds are as follows:

(1) The learned magistrate erred in fact and in law in wrongly admitting as evidence Exs 2.a and 2.b in that no proper authentication was established for such exhibits.

(2) The learned magistrate erred in fact and in law in purporting to take judicial notice of several matters that His Worship found as facts such matters not having been adduced in evidence let alone subject to cross-examination thereby such error resulting in miscarriage of justice.

(3) That given the learned magistrate's finding upon sentencing that the Appellants "were not directly involved in the actual takeover of parliament or the violence that flowed after May 19 Coup", His Worship erred in fact and in law in finding that the Appellants consorted with armed persons.

(4) The learned magistrate erred in law in deciding that onus of rebutting presumption under s 10(3) Emergency Decree No 4 of 2000 lay with the Appellants having regard to express words of s 9 of the decree assigning onus to the carrier or possessor of arms, given further that s 10(3) is not component of charge against the Appellants.

(5) The burden of proof on the first count was not discharged by the Prosecution.

(6) The learned magistrate erred in law in convicting the Appellants of the first count under Emergency Decree No 4 2000 such decree being invalid law under the Constitution of the Republic of Fiji.

(7) The learned magistrate erred in fact and in law in convicting the Appellants of unlawful assembly under second count, given parallel finding that the Appellants "were not directly involved in the actual takeover of parliament or in the violence that flowed after May 19 Coup".

(8) The learned magistrate erred in fact and in law in taking judicial notice of matters not adduced in evidence to support finding of guilt under second count given absence of reliable independent direct evidence of fear in the neighbourhood.

(9) The learned magistrate erred in fact and in law in finding the A5 guilty of the second count given admissions in cross examination by PW2 and PW3 that identification of the A5 by them was made vide police photographs.

(10) The learned magistrate erred in fact and in law in finding that the A5 was present at and was arrested in Kalabu further was present in parliament for 56 days whereas no evidence was adduced to support such findings.

(11) The learned magistrate erred in fact and in law in convicting the A1 and A2 of unlawful assembly under third count given that no evidence was adduced either stating or identifying the A1 and A2 as being present in Kalabu.

(12) The learned magistrate erred in fact and in law in finding that the Appellants has knowledge of the illegal takeover of parliament, of George Speight's men's activities, of the guns and of the hostage situation, in view of His Worship's own findings that the Appellants were "not involved in the actual takeover" nor "in the violence that flowed after May 19 Coup", further there being no evidence to support such finding.

(13) The learned magistrate erred in fact and in law in finding the A1, A2, A3 and A4 guilty under second count bearing in mind Appellants' evidence in unsworn statements of positively assisting in negotiations for resolution of national crisis, release of hostages and return of arms, thereby negating allegation of unlawful assembly.

(14) The learned magistrate erred in law in purporting to apply the standard and rationale in *State v Senitiki Naqa* [2003] FJHC 122 when determining sentence.

(15) The conviction under first count, second count and third count is unreasonable in totality of circumstances.

(16) The sentence for each Appellant is manifestly excessive as not support by the evidence.

The Appellants were originally represented by counsel. However at the hearing of the appeal and with the consent of the Appellants, counsel withdrew, leaving the A1 to make submissions for all the Appellants. He has done so ably and with a commendable degree of professionalism. I have also considered the written submissions filed by counsel for the Appellants, before his withdrawal.

The appeal

The first ground, which challenged the admission of the video recording taken at parliament, has been abandoned. The second ground of appeal is that the learned magistrate erred in accepting matters in evidence as a result of judicial notice.

The learned magistrate referred to 'judicial notice' at p 131 of the record and at p 9 of his judgment. He did so in relation to the counts of unlawful assembly. After setting out the elements of the offence he said:

> *Chandrika Prasad v Republic of Fiji Civil Action* [2000] FJHC 121: In this famous constitutional case the High Court took judicial notice that on May 19th 2000 there was an armed invasion of the Fiji Parliament which resulted in the members being taken hostage by George Speight and his men.

Thereafter, in his analysis of the evidence (at p 150 of the record), he said:

> The prosecution here has shown actual breaches vis a vis 'reasonable fear of breach' as required by the sections. Judicial notice is also taken of the events of May 19th coup and the hostage situation in Parliament at the material time resulting in an emergency law and order crisis in Fiji.

The Appellants say that the learned magistrate erred in relying on such judicial notice. I find, on a perusal of the record, that it was never in dispute that on 19 May 2000, there was a march through Suva town, an armed takeover of parliament, a hostage situation for 56 days and large crowds of people gathered in parliament. Indeed there is direct evidence on the record as to all these matters, in particular from PW1 and PW2. The defence case did not dispute these events. As such there was really no need to rely on judicial notice at all and the brief reference to it in the judgment was peripheral to the issues which were before the court for determination.

It was open to the learned magistrate, on the evidence, to conclude that the assembly at parliament and at Kalabu, was an unlawful assembly. There was evidence led of fear in the surrounding areas and of unlawful activities in both places, committed by various members of the assembly. The learned magistrate did not err in concluding that the assemblies were unlawful. This ground is dismissed.

The third ground of appeal is that the learned magistrate erred in convicting on count 1, when the Appellants were not party to the actual takeover of parliament. State counsel submits that the offence of unlawful assembly is different from any offence arising from the actual takeover of parliament and that the learned magistrate correctly referred to this issue as a mitigating factor in his sentencing remarks.

A person who unlawfully removes a government with arms, commits treason. A person who aids and abets him, is also guilty of treason. However, there are a host of other offences which may be committed by those who join in to support the treasonous acts after the event. I would, for want of a better phrase, call them "jump on the bandwagon" offences. For these offences, it is not necessary to prove the elements of the offence of treason. However knowledge that one is benefiting from the treason when committing another offence, may be an aggravating factor for the purpose of sentence. Much depends on the motives of the offender and the remoteness to the treason, of the offending. Thus, people who rushed to parliament after the treason was committed, to support it or to add numbers to the people already gathered there, were part of an unlawful assembly. This is because, held in parliament for 56 days, were captive parliamentarians. That unlawful event in itself made the gathering at parliament an unlawful assembly. The gathering was there to perpetuate an unlawful purpose. That was the evidence of PW1, PW2, PW3 and PW4. There may have been many persons at the assembly who did not know of the takeover of parliament before it occurred and who were not part of it. That is irrelevant to conviction. The only question in relation to count 2 was whether there was nevertheless an unlawful assembly and whether the accused were present at that assembly. In relation to count 1, the question for the court was whether the accused were consorting with people holding firearms without lawful excuse. The evidence of the unlawful takeover of parliament was only relevant for providing a background to the consorting.

The offences are not the same and the learned magistrate did not err when he distinguished the act of the takeover from the offences on the charge sheet. This ground is also dismissed.

Ground 4 states that the learned magistrate erred in his approach to the elements of the offence under s 10(1) of the Emergency Decree 2000.

Section 10 of the Emergency Decree 2000, provides as follows:

> (1) Any person who consorts with or is found in the company of another person who is carrying or who has in his possession any arm, ammunition or explosive, or any corrosive or inflammable substance, in contravention of section 9, in circumstances which raise reasonable presumption that he knew such other person had in his possession such arms, ammunition or explosives or such corrosive or inflammable substances, commits an offence.
>
> (2) Any person who consorts with or is found in company of a person who is carrying or has in his possession any arms, ammunition or explosives, or any corrosive or inflammable substances, in contravention of subsection (1), in circumstances which raise a reasonable presumption that he knew that such other person had in his possession such arms, ammunition or explosives, or such corrosive or inflammable substances, commits an offence.
>
> (3) Where in any prosecution for an offence against this section, it is established to the satisfaction of the court, that the accused person was consorting with or was in the company of any person carrying or having possession of any arm, ammunition, explosive, or any corrosive or inflammable substances, it shall be presumed until the

> contrary is proved that such last mentioned person was carrying or was in possession of such arm, ammunition or explosives, or such corrosive or inflammable substance in contravention of section 9.

The Appellants were charged with a contravention of s 10(1) of the decree that is, of consorting in circumstances which raise a reasonable presumption that there will be or has been a threat to public security. Section 9 provides for an offence of being in possession of arms without lawful excuse.

The Appellants say that s 10(3) did not create a negative averment and that in any event there was insufficient evidence to convict the Appellants on this count.

There are two negative averments under s 10(1) and (3) of the decree. The first is created by the words "without lawful excuse" under s 9, which is incorporated into s 10(1) and the second is created by s 10(3) as to a breach of s 9, once the prosecution has proved the consorting as a matter of fact. Finally, the words "in circumstances which raise reasonable presumption" in s 10(1), create not a negative averment, but a requirement of the consideration of evidence on the basis of which the court may make reasonable inferences.

Section 10(1) of the decree therefore provides that the prosecution must prove beyond reasonable doubt:

1. The accused consorted;
2. With a person carrying arms;
3. In circumstances which allow the court to draw reasonable inferences that that person will act or has acted in a manner prejudicial to public security.

The defence must prove, on a balance of probabilities the following:

1. The person carrying the firearm was authorised to carry it, that is he had a lawful excuse; and/or
2. In the case of a member of the armed forces, that he was carrying it in the execution of his duty.

Thus, at p 130 of the record, the learned magistrate correctly summed up as follows:

> The operation of section 10 is dependent on proof of section 9. Under section 10(3), if court is satisfied that accused were consorting with or is found in company of person carrying or has in his possession arms, it shall be presumed that it was so in contravention of section 9 (unless contrary is proved).
>
> The onus is on the Defendants to rebut the presumption under s 10(3) or to show it wasn't "without lawful excuse" under s 9, would be of a lower standard of balance of probabilities — *R v Petrie* [1961] 1 WLR 358; [1961] 1 All ER 466; *Daniel William Brown* (1971) Crim App Rep 478.

The learned magistrate therefore correctly directed himself on the elements of offence and on the negative averment created by s 10. He further found that because of the close connection between the carrying of arms and the unlawful takeover of government, there was evidence of acts prejudicial to public security. He set out other factors, at p 146 of the record, which allowed him to draw reasonable inferences of this element of s 10(1). They include the evidence of meetings attended with Speight, the drilling of civilians, the shooting incidents with the police and the army, the hostage situation and the deteriorating law and order crisis. He did not err when he decided that there was a reasonable presumption of acts prejudicial to public security.

Ground 5 alleges that there was insufficient evidence that each Appellant consorted in fact. However, there is strong evidence on the basis of the testimony of PW1, PW2, PW3, PW4 and PW11, of the presence of each Appellant in

parliament during the 56-day period specified in the charge. There is also evidence, including that of the A1's radio interview that there were armed men in parliament. It was not necessary to prove that all Appellants remained there, throughout the period. Nor was it necessary to prove that the Appellants themselves did acts prejudicial to public security. The Appellants themselves, in their unsworn statements did not deny their visits to parliament. Their motives were irrelevant to conviction. The evidence indicated their presence in parliament, with others who carried arms, in circumstances which were prejudicial to public security. Of course, the Appellants denied knowledge of the guns. There was however enough evidence before him to allow the learned magistrate to come to a contrary conclusion.

The A5 submits that there was no evidence of his presence in parliament at all. However, not only did he say that he did visit parliament in June 2000, in his own unsworn statement, but PW3 Sainimili Cavuilati, a police officer, said that she saw him there on 19 May, in a meeting with Speight, the A1, and the A2 and that she had seen him there with the Vice President, "Volavola" and the A1, A2 and A5 during the 2 days she was there. This evidence was not disputed in cross-examination, by the A5. This ground is also dismissed.

Ground 6 is that the emergency decree was not valid law under the Constitution. At the hearing of the appeal, the Appellants said that they did not dispute the validity of the decree under the doctrine of necessity, after 2 June 2000. However they submit, the decree was not law between 19 May 2000 and 2 June 2000 and that the charge on count 1 was therefore a nullity because it alleges acts of consorting during this period of time. The Appellants further say that as a result of the defect in the charge, they were prejudiced because the bulk of the evidence in relation to count 1 arose from the period immediately after 19 May.

State counsel submits that the decree was valid law under the doctrine of necessity, as has been found by judges in a number of cases. He further submits that the defect in the charge was not prejudicial to the Appellants and that they were barred from raising the issue on appeal because they had not raised it during the trial.

Section 342 provides as follows:

> No finding, sentence or order passed by a magistrates' court of competent jurisdiction shall be reserved or altered on appeal or revision on account of any objection to any information, complaint, summons or warrant for any alleged defect therein in matter of substance or form or for any variance between such information, complaint, summons or warrant and the evidence adduced in support thereof, unless it be found that such objection was raised before the magistrates' court whose decision is appealed from, nor unless it be found that, notwithstanding it was shown to the magistrates' court that by such variance the appellant had been deceived or misled, such magistrates' court refused to adjourn the hearing of the case to a future day:
>
> Provided that if the appellant was not at the hearing before the magistrates' court represented by a [legal practitioner], the [High Court] may allow any such objection to be raised.

It is indeed a matter of some surprise that counsel for the accused during the trial did not raise first the question of the validity of the emergency decree and second the defect in the charge, before the trial magistrate. Indeed the charges were amended twice and there were many opportunities from 2001 to 2005 to raise the issue. However, because the Appellants allege resulting prejudice, I have heard their submissions on this issue and have asked the State to reply.

Of the two issues, the first is easily answered. The emergency decree was enacted by Commodore Bainimarama on 2 June 2000. The preamble reads:

> *Whereas* given the escalating civil unrest and political uncertainty in the country with its attendant gave risks to life and property, it is imperative that the emergency situation continues in order to guarantee the safety of the people of Fiji and to maintain law and order.
>
> *Now therefore*, in exercise of the powers conferred upon me as the Commander and the Head of the Interim Military Government of Fiji, I proclaim the following—

In *Chandrika Prasad v Fiji* [2000] 2 FLR, Gates J set out the legal basis for the doctrine of necessity and referred to, with approval the following passage from the dissenting opinion of Lord Pearce in *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 at 732; [1968] 3 All ER 561 at 579:

> I accept the existence of the principle that acts done by those actually in control without lawful validity may be recognized as valid or acted upon by the courts, with certain limitations namely (a) so far as they are directed to and reasonably required for ordinary orderly running of the State, and (b) so far as they do not impair the rights of citizens under the lawful (1961) Constitution, and (c) so far as they are not intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful sovereign. This last (c) is tantamount to a test of public policy.

Gates J then said,

> It is obvious therefore, that the doctrine of necessity could come to aid Commodore Bainimarama in resolving the hostage crisis, imposing curfews, maintaining roadblocks and ensuring law and order in the streets. Once the hostage crisis was resolved and all other law and order matters contained if not entirely eradicated, the Constitution, previously temporarily on ice or suspended, would re-emerge as the supreme law, needing his support and that of the military to uphold it and to buttress it against any usurpers.

In *Livai Nagera v State* [2001] FJHC 75 the Appellant was convicted, inter alia, with breach of a curfew order under the emergency decree. At the hearing of the appeal the State adduced evidence on which it based its submission that the decree was a valid law. The evidence was of the armed takeover of parliament, of the shooting of soldiers and a journalist and of a deteriorating law and order situation leading up to 2 June when the decree was promulgated by the military commander. I accepted that evidence and found the decree to be valid, on the basis of the principles of necessity set out in *Mitchell v Director of Public Prosecutions* (1986) LRC (Const) 35 at 88. I further found the decree to constitute a permissible exception to the freedom of movement provision under s 34 of the Constitution.

In this case, had the question been properly raised before the learned magistrate, there was ample evidence led in the course of trial which would have given rise to a finding that the decree was valid. Indeed, there was evidence of the hostage-taking, the shooting, the periodic "break-outs" to commit criminal offences and the ongoing possession of arms. This was clearly an extraordinary situation. The Appellants do not dispute the seriousness of the situation facing the military and police at that time. It is not suggested that the decree was passed to further the objects of the takeover or to create a new legal order. The decree was valid law between 2 June and 27 July 2000.

The second argument in relation to ground 6 is more problematic. That issue is as to the validity of the charge on count 1. The Appellants say that they were prejudiced by the fact that much of the evidence led related to a period of time

before the emergency decree was promulgated. What was the effect on the charge and therefore on the trial? The statement of offence refers only to the emergency decree. The particulars of offence set out the dates 19 May–27 July 2000. Prior to 2 June 2000, the then President, Ratu Sir Kamisese Mara had promulgated the Public Emergency Regulations. They were gazetted on 26 May 2000, but were dated 19 May 2000. Regulation 1 provided that they came into force from 19 May 2000 and were valid for 14 days. By virtue of reg 10, an offence was created which is identical to s 10 of the emergency decree. There is no dispute that the offence of consorting existed between 19 May 2000, and 2 June 2000 and that the offence had the identical elements as the s 10(1) offence under the decree. Thus, the charge on count 1 could have been cured by amendment to the statement of offence. There can be no suggestion therefore of a breach of the right under the Constitution, not to be charged with an offence, under a law which has retrospective effect.

Not all defects in a charge result in the quashing of convictions. Much depends on the nature of the defect and on the extent of prejudice to the Defendant. Where the facts stated in the charge do not disclose an offence known to law, the conviction must be quashed on the ground that the proceedings were a nullity (*Director of Public Prosecutions v Bhagwan* [1972] AC 60; [1970] 3 All ER 97. A charge may be bad for duplicity but a conviction on a duplicitous charge will only be quashed if the accused did not know with precision what he was charged with and of what he is convicted. Where the particulars of offence could not support a conviction on the offence of which the accused is charged, any resulting conviction would have to be considered unsafe. The real questions appear to be whether the accused was prejudiced at the trial by the defect and whether despite the uncorrected defect, the charge clearly sets out what it was that the accused was supposed to have done and under what law. In *Christina Doreen Skipper v Reginam* [1979] FJCA 6, the Fiji Court of Appeal considered the validity of a charge under the Dangerous Drugs Ordinance (Cap 95). The Appellant was charged with importing Indian hemp and heroin. She was convicted and sentenced in the Magistrates Court. On appeal to the High Court, the appeal against sentence was allowed. On appeal to the Court of Appeal, she submitted, inter alia, that the charges were defective because the statement of offence referred to one section of the ordinance, but the particulars set out an offence created by another. The case had been conducted on the basis of the particulars of the offence. The statement of offence alleged importation of Indian hemp seed. The evidence was in relation to Indian hemp leaves.

The Court of Appeal considered the rules for the framing of charges in the Criminal Procedure Code (s 123) and said that the section required a description of the offence and the relevant statutory provision in order that "clear notice is given so that an accused at his trial may not be prejudiced in meeting the charge, and later upon conviction (or acquittal) the judgment will record sufficient particulars in the event that either the conviction (or acquittal) may be a relevant matter for proof or for any other reason …". This latter issue would be relevant if the accused needed, in the future, to raise a defence of autrefois convict.

The court said that there was a difference between a basic defect, which is not curable and an irregularity which may be curable. Referring to cases relevant to s 3 of the Indictments Act 1915 (UK), which was in the same terms as s 123 of the Criminal Procedure Code, the court held that where there was no embarrassment or prejudice to the accused by the omission to amend the defect, the proviso would be applied and the appeal would be dismissed. Examples of

such English cases are *R v McVitie* [1960] 2 QB 483; [1960] 2 All ER 498; (1960) 44 Cr App Rep 201, *R v Power* (1977) 66 Cr App Rep 159; *R v Yule* [1964] 1 QB 5; [1963] 2 All ER 780; (1963) 47 Cr App Rep 229 and *Clifford-Nelson* (1977) 65 Cr App Rep 119.

In this last case, the court said that where the indictment could have been amended, it was not a nullity. The Court of Appeal applied these principles and applied the proviso to dismiss the appeal in Skipper.

In *Director of Public Prosecutions v S Digambar* (Unreported, Supreme Court of Mauritius, Record No 20477, March 1978) the accused was charged with being in possession of gandia plants. This offence was formerly regulated by the Dangerous Drugs Ordinance 1950, but that ordinance was repealed by the Dangerous Substances Act 1974. The accused was charged under the repealed ordinance. The magistrate dismissed the charge on the ground that the offence did not exist. The Director of Public Prosecutions stated a case to the Supreme Court saying that the magistrate should have instead amended the information. The court held that in effect the offence still existed under both old and new legislation in all its elements. The statement of the offence was not a vital part of the information and did not render the charge a nullity.

In this case, the charge on count 1 could have been amended in two ways. The first was to amend the statement of offence to include reference to the Emergency Regulations passed by the then President on 19 May, which created the identical offence. The second was to amend the particulars of offence so that the operative dates were 2 June and 15 July 2000. Certainly the Appellants would not have been prejudiced with the first option because the offence still existed before 2 June. Nor would they have been prejudiced with the second option. Although the A1 submitted that the evidence led of their involvement before 2 June would have become inadmissible if an amendment as to the date would have been made, I do not agree. Section 10(1) of the decree specifically allows the court to draw reasonable inferences from all the circumstances of the consorting. That would allow the prosecution to lead evidence of the background to the consorting and the reason for it, in order to show that the circumstances were prejudicial to public security. The hostage crisis was a continuing situation. It arose from an unlawful takeover of parliament. So did the numerous meetings held at parliament attended by one or other of the Appellants. The evidence of consorting had to be led with the evidence of what occurred between 19 May and 2 June.

In *Senitiki Vulavou v State* [2005] FJHC 398, the Appellant was charged with an offence which did not exist when he committed it because the relevant decree and act had been repealed. The offence was committed on one day. The prosecution agree that the guilty plea and sentence had to be quashed. I ordered a retrial.

In this case however the emergency decree was valid for a large part of the offending. The Appellants committed the offence over a period of about 2 months. The defect in the charge was in relation to a period of 2 weeks and could have been cured by amendment either of the statement of offence or particulars of offence. The evidence led of the period between 19 May and 2 June was admissible anyway, to explain the circumstances of the possession of arms and of the consorting. The basis of the defence cases was not that they were not in parliament, but that they knew nothing of any arms and ammunition. The evidence was that there were armed men at parliament throughout the whole period of the hostage crisis. PW4 spoke of people dressed in civilian clothes, holding guns and PW1 who was a hostage for 56 days, said he and the other

hostages were guarded by men carrying rifles. PW2 gave evidence of being locked up for 56 days by men carrying guns and that the Appellants were "hanging around parliament all the time in 56 days".

There could have been no better evidence of the charge of consorting with men carrying arms, and I consider that the defect in the charge was not such as to render the proceedings a nullity. There was no prejudice to the Appellants who clearly understood the nature of the charge and who ran defences of innocent association or ignorance of the presence of arms.

There being no miscarriage of justice this ground is also dismissed.

I have already dealt with ground 7 and with the elements of offence for the charge of unlawful assembly on counts 2 and 3. The learned magistrate correctly directed himself on the elements of the offence, relying on the decision of *Abdul Sattar v Reginam* [1960–61] 7 FLR 14. In that case Lowe CJ said (at p 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 neighbour- hood 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 the peace.

Recently, the law of unlawful assembly was considered in *State v Apisai Tora* [2005] FJHC 535 by Connors J. In that case, there was evidence, led in the Magistrates' Court, of a group of over 100 people taking over an army checkpoint at Sabeto. There was evidence that the soldiers at the checkpoint were fearful for their safety. His Lordship held that the assembled group, who were shouting and wearing red headbands and who had blocked the highway to traffic, "must have put people in fear or terror" and that it was unnecessary to call direct evidence of terror of the public.

In this case, there was evidence of large groups of people assembled at parliament, where hostages were held at gunpoint. There was evidence of a march on police and army checkpoints, causing members of the security forces to fear for their lives. There was evidence of persons in parliament committing criminal offences in the neighbourhood. There was evidence of the shooting of soldiers and a journalist by members of the assembly. Finally, there was evidence even on the defence version of the facts, that each Appellant was present at the unlawful assembly. As State counsel submitted, the prosecution case was that the Appellants were there to support the hostage-takers and the armed men. They were not there to support or help the hostages. Certainly, the learned magistrate accepted the prosecution case on that basis. This ground is dismissed, as is ground 8. There was ample evidence of an unlawful assembly in parliament.

Grounds 10 and 11 are that there was no evidence that the A1, A2 and A5 were present at the unlawful assembly at Kalabu. The Appellants do not suggest that the assembly at Kalabu was lawful. Indeed there was sufficient evidence that it was not, because the same people who assembled in parliament, then assembled at Kalabu and created fear in that neighbourhood.

The A5 was not charged on count 3. The A1 and A2 were charged on count 3. The evidence implicating them came from PW1 (Sefanaia Vilivalu) an SVT Officer of Kalabu. He said, at page 81 of the record that he saw the A1, A2 (and A5) at the Kalabu Fijian School where a celebration was held to thank the George

Speight supporters in the indigenous cause. He also saw the A2 at the gate of the school. It was never suggested to him in cross-examination that he was mistaken or lying, in identifying the two Appellants as being present at the Kalabu assembly. Nor did the Appellants deny their presence at Kalabu when they made their unsworn statements. In the circumstances the learned magistrate was entitled to convict them on count 3, as he did.

Ground 12 has already been dealt with. Ground 13 is that the learned magistrate erred in finding the Appellants guilty when they were positively assisting in resolving the national crisis. Which version of the facts were to be accepted, was of course a matter for the learned magistrate. He chose to accept the prosecution version of the facts and that was that each Appellant was involved in the events to support George Speight and that they consorted with armed men and were part of an unlawful assembly. The learned magistrate was able to view the television footage, hear the witnesses and assess the credibility of witnesses and Appellants alike. He did not accept the defence version of the facts and he gave his reasons. He came to a conclusion which was available to him on the facts. This ground is dismissed.

Sentence

The maximum sentence under s 10 of the emergency decree is 4 years' imprisonment and a fine of $2000. The learned magistrate chose a starting point of 3 years' imprisonment and adjusted the sentences depending on levels of culpability. He did not err in his approach.

In respect of unlawful assembly, the maximum sentence is 12 months' imprisonment. The 6-month and 8-month terms imposed are not excessive, and are consistent with the sentences imposed in *State v Apisai Tora* and with *State v Senitiki Naqa* [2003] FJHC 122. In the latter case, I said that a starting point of 9 months' imprisonment for unlawful assembly at Monasavu, in order to settle a land dispute, was justified. A sentence of 6 or 8 months' imprisonment after all necessary adjustments was appropriate.

As it is, in this case the unlawful assemblies in parliament and at Kalabu involved the holding of hostages, the use of firearms and they took place over a most difficult time in Fiji's history. The terms imposed, of 8 months' and 6 months' imprisonment are, if anything, lenient sentences, given the enormity of the events in question. In relation to the A5, his involvement was seen as the least culpable although he had been present in parliament over the whole period of the hostage-holding according to the prosecution case. The total term imposed on him, of 15 months' imprisonment reflected his lesser culpability.

For these reasons, the appeal against sentences also fails. In the circumstances of the offending, there was no possibility of a non-custodial term of imprisonment.

Result

This appeal is dismissed.

Appeal dismissed.