RATU RAKUITA VAKALALABURE v STATE (CAV0003 of 2004S)

SUPREME COURT — CRIMINAL JURISDICTION

FATIAKI CJ, HANDLEY and SCOTT JJ

18 October 2005, 15 June 2006

Criminal law — appeals — treason — whether ostensible bias — whether 2-year limit for treason expired — Penal Code s 54 — Public Order Act s 5(b).

Shortly after noon on 20 May 2000, the day after the Speight coup at Parliament House, the petitioner was sworn in as Minister for Justice and Attorney-General in the purported Speight Government in a ceremony in Parliament House in front of television cameras. The petitioner was one of six charged with offences contrary to s 5(b) of the Public Order Act of taking engagements in the nature of an oath to commit a capital offence in that, not being compelled to do so, they each took an engagement in the nature of an oath purporting to bind themselves to commit treason.

The six accused were tried in the High Court before Shameem J and five assessors. The trial commenced on 28 June 2004, and on 5 August the assessors found five of the accused guilty, in the case of the Petitioner and two others, by a majority of four, and the sixth was found not guilty. The judge agreed with the assessors and entered verdicts accordingly. The Petitioner was sentenced to 6 years' imprisonment on 6 August.

Appeals by the five to the Court of Appeal were dismissed on 3 November 2004. Three of the five applied to this court for special leave but the two withdrew leaving Rata Rakuita Vakalalabure as the sole petitioner.

Two grounds were argued in support of the petition, the ostensible bias of one of the assessors, and the effect of the 2-year limitation period for charges of treason under s 54 of the Penal Code which had expired before this prosecution was commenced.

Held — The claim that the trial was vitiated by the ostensible bias of one of the assessors was without substance. The facts, which came to light after the trial, were that Mr Sharma, counsel for the fourth accused, who was acquitted, represented one of the assessors in divorce and matrimonial proceedings before and during the trial. This provides no basis for challenging the assessors' majority opinion that the petitioner was guilty as charged. The decision of the Court of Appeal to reject this claim was clearly correct and special leave should not be granted for a further appeal on this point.

The proper practice in sentencing co-offenders was to adopt a common starting figure to reflect the objective gravity of the offence, and to adjust this for each offender by taking into account matters of aggravation and mitigation and any other subjective features. In the case of the former Vice-President of Fiji the trial judge adopted a starting point of 6 years but in the case of the other three who were convicted with the Vice-President, her starting point was 4 years. This latter figure was not affected by impermissible matters of aggravation and should be adopted as the starting point for the petitioner as well. If this was done and the other findings and reasons of the trial judge are applied to it the result was a sentence of 4 years' imprisonment. This should be substituted for that imposed by the trial judge.

Petition dismissed.

Cases referred to

R v Blight (1903) 22 NZLR 837; *R v Rosewell* (1684) 10 State Trials 269; *R v J* [2005] 1 AC 562; [2005] 1 All ER 1; *Saraswati v R* (1991) 172 CLR 1; 100 ALR 193; *State v Ratu Timoci Silatolu* [2002] FJHC 71, cited.

Connelly v Director of Public Prosecutions [1964] AC 1254; [1964] 2 All ER 401; *Joseph v R* [1948] AC 215; *Kingswell v R* (1985) 159 CLR 264; 62 ALR 161; *R v Frost* (1793) 22 State Trials 575; *R v Bright* [1916] 2 KB 441; *R v De Simoni* (1981) 147 CLR 383; 35 ALR 265; *Zakos v R* [1956] 1 WLR 1162, considered.

Petitioner in person

D. C. Frearson SC, *A. Prasad* and *Lagilevu* for the Respondent

Fatiaki CJ, Handley and Scott JJ.

Introduction

[1] Shortly after noon on 20 May 2000, the day after the Speight coup at Parliament House, the Petitioner was sworn in as Minister for Justice and Attorney-General in the purported Speight Government in a ceremony in Parliament House in front of television cameras. The Petitioner was one of six charged with offences contrary to s 5(b) of the Public Order Act of taking engagements in the nature of an oath to commit a capital offence in that, not being compelled to do so, they each took an engagement in the nature of an oath purporting to bind themselves to commit treason.

[2] The six accused were tried in the High Court before Shameem J and five assessors. The trial commenced on 28 June 2004 and on 5 August the assessors found five of the accused guilty, in the case of the Petitioner and two others, by a majority of four, and the sixth was found not guilty. The judge agreed with the assessors and entered verdicts accordingly. The Petitioner was sentenced to 6 years' imprisonment on 6 August.

[3] Appeals by the five to the Court of Appeal were dismissed on 3 November 2004. Three of the five applied to this court for special leave but two withdrew leaving Rata Rakuita Vakalalabure as the sole petitioner.

[4] Two grounds were argued in support of the petition, the ostensible bias of one of the assessors and the effect of the 2-year limitation period for charges of treason under s 54 of the Penal Code which had expired before this prosecution was commenced.

Ostensible bias

[5] The claim that the trial was vitiated by the ostensible bias of one of the assessors is without substance. The facts, which came to light after the trial, were that Mr Sharma, counsel for the fourth accused, who was acquitted, represented one of the assessors in divorce and matrimonial proceedings before and during the trial. This provides no basis for challenging the assessors' majority opinion that the Petitioner was guilty as charged. The decision of the Court of Appeal to reject this claim was clearly correct and special leave should not be granted for a further appeal on this point.

Effect of time bar for treason

[6] Section 50 of the Penal Code, as in force on 20 May 2000, defined the crime of treason as follows:

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

[7] Section 54 imposed a 2-year time limit for prosecutions for breach of s 50 of the Penal Code in the following relevant terms:

> A person cannot be tried for treason, … unless the prosecution is commenced within two year's after the offence is committed.

[8] Section 5 of the Public Order Act passed long after the Code provides:

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

[9] The Petitioner, who is legally qualified, submitted that the Court of Appeal erred in failing to hold that the proceedings were either an abuse of process or incompetent because in substance he was charged with conduct amounting to treason in a prosecution commenced when a prosecution for treason was time-barred.

[10] The legal problems that arise when a prosecution is brought for an offence which could have been charged as a different offence but for the effect of a time bar, have engaged the attention of appellate courts in New Zealand — *R v Blight* (1903) 22 NZLR 837 (*Blight*), Australia — *Saraswati v R* (1991) 172 CLR 1; 100 ALR 193 (*Saraswati*) and the United Kingdom — *R v J* [2005] 1 AC 562; [2005] 1 All ER 1 (*R v J*).

[11] Prosecutions for unlawful sexual intercourse with an underage female were time-barred, but were brought on the same facts for indecent assault (New Zealand and the United Kingdom) or for committing an act of indecency (Australia).

[12] In *R v J* the prosecution for indecent assault was based on unlawful sexual intercourse with an underage female. Lord Bingham referred to the prosecutor's written case summary at the trial (at AC 566; All ER 5) and the judge's direction to the jury who left to them (at AC 567; All ER 5) as "*the sole issue … are you satisfied … that the defendant had sexual intercourse with [C]?*". The charges did not relate to what Lord Bingham described as "*an independent act, not inherent in or forming part of the sexual intercourse which took place between them*" (at AC 567 and 574; All ER 5 and 12). He said that the accused was being prosecuted for "*the same conduct*" under one section (at AC 572; All ER 10) that could no longer be charged under another section of the same Act which dealt directly with that conduct. The prosecution was contrary to the statute because "*Parliament has ordained that conduct of a certain kind shall not be prosecuted otherwise than within a certain period*" (at AC 574; All ER 12) and the court "*must seek to give effect to all the provisions of a statute*" (at AC 571; All ER 9).

[13] Lord Steyn said that the question was whether the prosecutor could charge "*conduct*" covered squarely (at AC 575; All ER 14) by one section under another section of the Act "*for the sole purpose of avoiding the time limit*" (at AC 576; All ER 14). Lord Clyde said that the act of sexual intercourse was "*the essence of the complaint*" (at AC 579; All ER 15) and the appropriate charge must be governed by the predominant facts of the case (at AC 579; All ER 15). In that case the facts disclosed "*nothing more in the way of assault than the act of unlawful sexual intercourse*" (at AC 579; All ER 15). He concluded that "*it would be a misapplication of the statute to allow a case which neatly and comprehensively falls within*" one section to proceed under another. Once the time limit for the true offence had passed "*it is not possible to present the same facts as an offence*" under a different section (at AC 580; All ER 18).

[14] Lord Rodger of Earlsferry held that the case turned on the construction of the section under which the prosecution was brought "in the context of the 1956 Act as a whole" (at AC 584; All ER 21). He said that the critical question was one of "the construction of the Act" (at AC 584; All ER 21).

[15] The appeal was allowed by majority and the convictions for indecent assault were quashed.

[16] In *Saraswati*, the appellant had been convicted on charges of committing acts of indecency with an underage female contrary to s 61E(2) of the Crimes Act (NSW) for conduct that constituted an indecent assault within s 61E(1) or carnal knowledge of an underage female within s 71. The charges were brought after the time limit in s 78 for prosecutions for those offences had expired.

[17] The High Court, by majority, allowed the appeal and quashed the convictions. Gaudron J, one of the majority, said at CLR 18; ALR 204:

> … although, by force of s 78, the applicant could not be charged with carnal knowledge and indecent assault, his prosecution under s 61E(2) required him, as a matter of practical reality, to answer those very charges.

[18] Her Honour considered that when the statute was read as a whole the expression "*act of indecency with or towards a person*" in s 61E(2) did not include an act that constituted indecent assault, carnal knowledge or attempted carnal knowledge.

[19] McHugh J, with whom Toohey J agreed, said (at CLR 19) that the question before the court was whether a person could be charged under s 61E(2) on evidence which established an offence of indecent assault or carnal knowledge but no more. He held (at CLR 27–31; ALR 211–14) that the accused could not be convicted of an act of indecency if that act "*was part of sexual intercourse or an indecent assault*". He treated as material the fact that the relevant sections appeared in the same statute: at CLR 23, 23–4, 24, 28 and 30. That case, like *R v J*, had been fought at the trial as one of carnal knowledge and indecent assault although each offence had been given the label "*act of indecency*" (at CLR 31; ALR 214).

[20] The majorities in *Saraswati* and *R v J* followed the majority decision in *Blight*.

[21] These decisions are applicable where the conduct could be prosecuted under different sections of the same Act but the time limit for a prosecution under one section has expired. They establish the following propositions relevant to this case:

(1) The effect of such an Act is that the same conduct cannot be prosecuted under another section to avoid the time bar.
(2) A prosecution can be brought under a different section for independent conduct which was not merely part of the conduct which constituted the time barred offence.
(3) The appropriate charge depends on the predominant facts of the case.
(4) In those cases the indecent assaults or acts of indecency charged, were the acts of unlawful sexual intercourse or attempted unlawful sexual intercourse and the former could not be proved without proving the latter.

[22] These cases do not deal directly with the situation where the offences are created by different statutes and the accused has been charged with an offence under the later one. In the event of inconsistency the later statute will prevail and

impliedly repeal or amend the earlier to the extent of the inconsistency, but there is a strong presumption that parliament intends both to be in force.

[23] The Petitioner submitted that the oath he took when he was sworn in as a minister in the purported Speight Government, in the circumstances recorded on the TV video, was an overt act of treason. The prosecution therefore proved the taking of an engagement in the nature of an oath that was not independent of the offence of treason but part of his conduct that constituted that offence.

[24] Treason by the law of England and thus of Fiji, is an exceptional crime because as s 50 of the Penal Code provides, it criminalises merely "*compassing, imagining, inventing, devising or intending*" acts which would be treason if and when committed such as levying war against the government and usurping the powers of government. The information in *State v Ratu Timoci Silatolu* [2002] FJHC 71, which Wilson J refused to quash, included among the overt acts of treason alleged "*(3) the unlawful formation of an illegal Government; … (5) the unlawful promulgation of various enabling Decrees under which the two accused, together with George Speight and others, purported to appoint a President, a Prime Minister and other Ministers and others under the 'Taukei Civilian Government'; … (8) the unlawful breaching of their duty of allegiance to the lawful Government*".

[25] There is no doubt that spoken words may constitute an overt act of treason. In the *Trials of the Regicides* (1660) 5 State Trials 986 at 988–9 the Lord Chief Baron directed the grand jury as follows:

> In no case else imagination, or compassing, without an actual effect of it, was punishable by our law … But in the case of the King, his life was so precious, that the intent was treason by the common law; and declared treason by this statute … This compassing and imagining the cutting off the head of the King is known by some overt act. Treason is in the wicked imagination, though not treason apparent; but when this poison swells out of the heart and breaks forth into action, in that case it is high treason.
>
> Then what is an overt act of an imagination or compassing of the King's death? Truly it is any thing which shows what the imagination is. Words, in many cases, are evidences of this imagination; they are evidence of the heart … so … if two men do conspire to levy war against the King … then … there is another branch of this statute, the levying of war is treason.

[26] The fact that words may be an overt act of high treason was confirmed in *R v Rosewell* (1684) 10 State Trials 269 at 295–6. Again in *R v Frost* (1793) 22 State Trials 575 at 580 it was said, quoting Foster's Crown Law:

> Loose words, therefore, not relative to any act or design, are not overt acts of treason, but words of advice or persuasion, and all consultation for all … traitorous purposes … are certainly so, they are uttered in contemplation of some traitorous purpose, actually on foot or intended, and in prosecution of it.

[27] Although a treasonable oath will generally be an overt act of treason, it cannot be a capital offence for the purposes of s 5(b) of the Public Order Act: *see* [8] above. This construction is necessary to avoid the absurdity of reading s 5(b) as applying to the taking of an oath or engagement by a person binding him to take that oath or engagement. The oath or engagement made punishable by s 5 in a case of treason must refer to some overt act or acts of treason other than the taking of the oath or engagement itself.

[28] The oath taken by the Petitioner bound him to give his counsel and advice as Minister for Justice and Attorney-General to the interim President and to be a true and faithful minister.

[29] The decisions in *R v J* and *Saraswati* [*see*: [10] and the following above] were not explicitly based on principles derived from the defence of autrefois acquit but similar principles were applied. If the accused in *R v J* had been charged within time with unlawful sexual intercourse and acquitted, he could not have been charged with indecent assault based on the same facts and the position was the same in *Saraswati*. The plea of autrefois acquit was not available in those cases because charges for the more serious offences had not been brought and would not have been available if prosecutions brought out of time failed for that reason.

[30] Situations where a person is not criminally responsible for a crime because he was acquitted, are analogous to those where he is not criminally responsible because a time bar prevents a prosecution. The abuse of criminal process involved in a prosecution barred by autrefois acquit is mirrored in that involved in charging the same facts as another offence to avoid a time bar. If the Petitioner having been acquitted of treason on a prosecution brought within time could still have been prosecuted under s 5(b) of the Public Order Act, he would be amenable to such a prosecution after the 2-year time limit for treason has expired.

[31] The defence of autrefois acquit was considered in depth in *Connelly v Director of Public Prosecutions* [1964] AC 1254; [1964] 2 All ER 401 and Lord Morris of Borth-y-Gest formulated the law in a series of propositions. Those relevant for present purposes are (at AC 1305–6; All ER 412):

> (6) that on a plea of autrefois acquit … a man is not restricted to a comparison between the later indictment and some previous indictment or to the records of the court, but that he may prove by evidence all such questions as to the identity of persons, dates and facts as are necessary to enable him to show that he is being charged with an offence which is either the same, or is substantially the same, as one in respect of which he has been acquitted … (7) … what has to be considered is whether the crime … charged in the later indictment is the same or is in effect or is substantially the same as the crime charged … in a former indictment and … it is immaterial that the facts under examination or the witnesses being called in the later proceedings are the same as those in some earlier proceedings.

[32] He developed these propositions and said at AC 1307–8; All ER 413:

> The principle seems clearly to have been recognised that if someone had been … acquitted of an offence he could not later be charged with the same offence or with what was in effect the same offence. In determining whether or not he was being so charged [the] reality of the matter was to be ascertained. That, however, did not mean that if two separate offences were committed at the same time … an acquittal in respect of one would be any bar to a subsequent prosecution in respect of the other. It was the offence or offences that had to be considered. Was there in substance one offence — or had someone committed two or more offences?

[33] He relevantly concluded (at AC 1309–10; All ER 414):

> It matters not that incidents and occasions being examined on the trial of the second indictment are precisely the same as those which were examined on the trial of the first. The court is concerned with charges of offences or crimes. The test is, therefore, whether such proof as is necessary to convict of the second offence would establish guilt of the first offence … Applying to the present case the law as laid down, the question is whether proof that there was robbery with aggravation would support a charge of murder or manslaughter. It seems to me quite clear that it would not. The crimes are distinct. There can be robbery without killing. There can be killing without robbery. Evidence of robbery does not prove murder or manslaughter … Nor does an acquittal

> of murder or manslaughter necessarily involve an acquittal of robbery … That the facts in the two trials have much in common is not a true test of the availability of the plea of autrefois acquit. Nor is it of itself relevant that two separate crimes were committed at the same time so that in recounting the one there may be mention of the other.

[34] This analysis suggests that the objection sustained in *R v J* and *Saraswati* should not depend on the offences being created by the same statute, although the objection will be easier to sustain where that is the case.

[35] It is evident that the elements of the offences created by s 50 of the Penal Code and s 5(b) of the Public Order Act are *not* the same. The offence of treason requires proof of a treasonable intent and a relevant overt act or acts. The offence under s 5(b) only requires proof that the requisite oath or engagement was taken voluntarily. It does *not* require proof of treasonable intent or proof that the act or acts of treason referred to in the oath were ever committed. As demonstrated above the taking of the oath itself cannot be an act of treason for this purpose.

[36] The information did not charge the Petitioner with treason. In *R v J* [at [12]–[14] above] the accused had in fact been tried for unlawful sexual intercourse on an indictment for indecent assault, so that proof of the crime as charged proved the other offence and this was also the case in *Saraswati* [at [16]–[19] above]. In those cases the prosecution made no attempt to prove an indecent assault that was independent or severable from the unlawful sexual intercourse and the majority in the House of Lords and two of the majority in the High Court held that the facts would not have supported such a charge.

[37] The test for a plea of autrefois acquit formulated by Lord Morris of Borth-y-Gest was [*see*: [33] above] "whether such proof as is necessary to convict of the second offence would establish guilt of the first". It is clear that a conviction on this information would not establish that the accused were guilty of treason. However the indictments in *R v J* and *Saraswati* would also have passed that test.

[38] The question must also be considered as a matter of substance. In *R v J* and *Saraswati* the conduct proved at the trial which formed the basis of the indecent assault and indecency charges established the time-barred offences of unlawful sexual intercourse. It is therefore necessary to examine the underlying conduct of the Petitioner that was proved at the trial to determine whether it established treason.

[39] Mr Tedeschi SC in opening the State's case to the assessors, focused on the elements of the offence under s 5(b) and made it clear that the State did not allege that the accused had committed treason and it was not necessary for the State to do so. He said "*the State has to prove the elements of the charge. Nothing more than that and nothing less*". Later in his opening he said:

> … it is not necessary for the State to prove that treason was committed. It is not even necessary for the State to prove that each of the accused intended to do these acts which would have amounted to treason. This whole case is about looking at the actual oath itself … The State does not suggest that [the] accused went on to perform any acts as rebel President or Ministers. They're charged with taking the oath. That's the beginning and end of the offence that's alleged against them … It's not necessary for the prosecution to prove that the accused did any acts in pursuance of their oaths … they are not charged with treason.

[40] The Petitioner's edited record of interview [*see*: Vol 6 pp 1496–1512 appeal record] covered the events on 19 and 20 May 2000 and later but contained no admission of treasonable activity other than the taking of the oath. He did not

claim during that interview that he took the oath under compulsion or duress. The evidence for the prosecution included a video of the second press conference given by Mr Speight on 19 May during which the Petitioner made statements in Fijian and English [*see*: Vol 5 pp 1485/6 appeal record] and a transcript. During this press conference the Petitioner was held out as the Home Affairs Minister. The video of the oath taking ceremony was also in evidence, together with a transcript but the latter is not in the record.

[41] In his closing address Mr Tedeschi again told the assessors that it was not necessary for the prosecution to prove that the accused intended to commit treason or did other treasonable acts because the essence of the offence was the taking of the oath [*see*: Vol 5 p 1256 appeal record]. He dealt at length with the defence of compulsion and the facts relevant to that defence. He said that the fact that Mr Speight chose the accused, including the Petitioner and allowed them to leave the parliamentary complex and that they came back later showed that there was no compulsion (p 1257 ibid). He said that the prosecution case against the Petitioner revealed (p 1259 ibid):

> … not only was he a willing, voluntary participant in the swearing-in ceremony, but that after the take-over of Parliament he assumed a major role on the 19th and 20th of May, in what was happening around the Parliament. His role was more than just taking the oath. He was one of the gang of three … involved in organising what was happening.

[42] In relation to the video of the press conference Mr Tedeschi told the assessors (p 1261 ibid) "*you only have to look at the video to realise, this was not something which he was doing under any force or compulsion or threat. He was one of a gang of three at this stage*". He also referred to evidence that had been given of meetings of the parliamentary representatives of the Fijian Association Party, who included the Petitioner, on 19 and 20 May and said (p 1262):

> His actions on that day, the day before the swearing-in show that he was acting in an entirely voluntary way, nobody was forcing him to do anything.

[43] The video of the oath taking ceremony was shown again and the assessors were invited to find that the Petitioner was an active willing participant. Mr Tedeschi referred to his record of interview and reminded the assessors that the Petitioner had not claimed then that his oath was a sham or that he had acted under compulsion.

[44] The evidence of other events on 19 and 20 May and later was properly led by the prosecution to negative the defences that the oath was a sham and the Petitioner had taken it under compulsion.

[45] In her summing-up, the trial judge told the assessors that an intention of committing treason was not an element of the offence and the prosecution did not have to establish that intention or that the accused intended to be bound by their oaths: *see*: Summing-Up p 6. She told the assessors that they needed ask themselves whether the oaths appeared to bind those taking them to take positions in the unlawful Speight Government (pp 7–8 ibid).

[46] She told the assessors that because some of the accused, including the Petitioner, said they were forced to take part in the ceremony, they had to look closely at the surrounding events (p 12 ibid). In the course of summarising the Petitioner's defence she told them that they had to decide (p 26 ibid) whether threats of death or grievous bodily harm were made to him before he took the oath, whether those threats in fact compelled him to take the oath, whether a reasonable person would have succumbed to the pressure and whether he had an

opportunity to escape. She told them that in considering these questions they were entitled to take into account the videos and the evidence of other invited parliamentarians who avoided taking part in the ceremony by refusal or deception.

[47] No redirection or further direction was sought by counsel for the Petitioner at the conclusion of the summing-up.

[48] The evidence against the Petitioner was not limited to the oath taking ceremony itself, but covered other events which tended to establish overt acts of treason and treasonable activity. This evidence was properly led to negative his defences that he took the oath under compulsion and it was a sham or charade. The Petitioner was not charged with any offence based on these events and the assessors were directed to consider them only for the purpose of determining whether the prosecution had negatived his defences.

[49] On the whole of the material the court can safely find that the Petitioner was not charged, tried or convicted of any offence other than that charged in the information. More importantly he was not tried or convicted of treason in proceedings commenced after the time bar for that offence had expired.

[50] Given this finding the Petitioner can only succeed if s 5 of the Public Order Act, when construed with the Penal Code, either has no application to an oath or engagement to commit treason or no application once the time for a prosecution for treason has expired.

[51] There could be a basis for either view if the offences were created by different sections of the same Act. There is no basis whatever for those views when the offence of treason and its limitation provision, were created by the Penal Code in 1944 and the offence for which the Petitioner was convicted was created by a separate Act in 1969. An earlier Act cannot amend a later one or affect its construction unless the later Act expressly amends the earlier or requires the two Acts to be read together. This conclusion is put beyond all possible doubt by s 2(a) of the Penal Code which provides:

> 2 Except as hereafter expressly provided nothing in this Code shall affect—
>
> (a) the liability, trial or punishment of a person for an offence … against any other law in force in Fiji other than this Code.

[52] This section applied to legislation in force when the Penal Code took effect. It could not fetter the law making powers of the legislature of Fiji and it has no direct application to later legislation other than amendments to the Code. If the Code, in accordance with s 2(a), was not intended to affect existing legislation creating criminal offences, there is no basis for thinking it affects later legislation such as the Public Order Act.

[53] In written submissions filed by leave after the hearing the State referred to a number of Privy Council and other decisions on the equivalent of s 2 of the Penal Code. None are directly in point but in *Zakos v R* [1956] 1 WLR 1162 at 1168 Viscount Simonds said:

> At the time when the Criminal Code came into operation, other legislation creating offences remained in force and it must have been contemplated that further legislation dealing with particular offences might be passed. The purpose and effect of section 2(a) was merely to provide that the Criminal Code should not be regarded as exhaustive.

[54] The challenges to the decision of the Court of Appeal to affirm the Petitioner's conviction fail and in this respect the petition is dismissed.

[55] In considering whether the Petitioner was charged and tried for treason this court looked closely at the evidence in the course of the trial before concluding, as it has, that he was properly tried and convicted for taking an oath binding himself to commit treason. However in doing so the court became concerned that the Petitioner may have been sentenced for treasonable conduct for which he was not charged or convicted. The trial judge in her remarks on sentence said of the Petitioner:

> … much of the planning for the Speight Government was done by you … You also had some input into the choosing of Ministers for various portfolios. You yourself earlier accepted a position as Home Affairs Minister before you swore the oath to be Attorney General. To reflect your greater culpability, I choose a starting point of 8 years imprisonment.

[56] This conduct was proper before the court on the issues raised by the Petitioner's defences of compulsion and sham, but was *not* before it for any other purpose. The Petitioner might have been charged with treason in respect of these overt acts but of course any such charge was time-barred. Moreover those events preceded the taking of the oath that was the subject of the charge.

[57] This point was not taken in the petition and was not raised before the Court of Appeal. However it is a fundamental principle of our criminal law, inherited from England, that a person must not be punished except for offences for which he has been tried and convicted. It is a necessary corollary of this principle that a convicted person must not be sentenced for uncharged offences or matters of aggravation. It applies with special force where a prosecution for those uncharged matters would be time-barred.

[58] These principles are well-established. In *R v Bright* [1916] 2 KB 441 (*Bright*) the accused pleaded guilty to two counts of attempting to elicit information with regard to the manufacture or war material. The trial judge sentenced him on the basis that he did these acts in order to assist the enemy. If this had been charged and proved he would have been liable to a sentence of death, but he had not been so charged and the offences to which he had pleaded guilty attracted a maximum sentence of life imprisonment. Darling J, giving the judgment of the Court of Criminal Appeal, said at KB 444–5:

> … the judge … must not attribute to the prisoner that he is guilty of an offence with which he has not been charged — nor must he assume that the prisoner is guilty of some statutory aggravation of the offence which might, and should, have been charged in the indictment if it had been intended that the prisoner was to be dealt with on the footing that he had been guilty of that statutory aggravation.

[59] This decision was followed by the High Court of Australia in *R v De Simoni* (1981) 147 CLR 383; 35 ALR 265 where Gibbs CJ said at CLR 389; ALR 268:

> … the general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he has not been convicted … a judge, in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.

[60] Subsequently in *Kingswell v R* (1985) 159 CLR 264 at 278; 62 ALR 161 at 171 Gibbs CJ, Wilson and Dawson JJ referred again to *Bright* and said:

> … ever since that time textwriters have regarded the statement by Darling J as correctly stating the practice to be followed.

[61] The joint judgment then referred to *Halsbury's Laws of England*, *Archbold's Criminal Pleading Evidence & Practice* and New Zealand and Canadian decisions in which *Bright* had been followed.

[62] The passages from the judge's remarks on sentence quoted above demonstrate that the Petitioner has been sentenced for conduct for which he was not and could not be charged. As Sir John Beaumont said in *Joseph v R* [1948] AC 215 at 220, in an appeal from Fiji:

> In the result the appellant has been … sentenced by a judge who had not convicted him.

[63] The point is so fundamental and so important that this court should take the exceptional course of intervening. Special leave should be granted, the decision of the Court of Appeal confirming the sentence should be set aside and in lieu, the appeal to that court should be allowed and the sentence quashed. The Petitioner must be re-sentenced by this court.

[64] The trial judge, having taken into account the matters which had not been charged, said that: "*to reflect your greater culpability I choose a starting point of 8 years imprisonment*". She then took into account mitigating factors and reduced this by half to 4 years but then properly took into account other matters of aggravation, such as the betrayal of his oath as a parliamentarian, and the effect of his taking the oath in lending credibility to the Speight Government. Having regard to these aggravating factors she added 2 years and imposed a sentence of 6 years' imprisonment.

[65] The proper practice in sentencing co-offenders is to adopt a common starting figure to reflect the objective gravity of the offence and to adjust this for each offender by taking into account matters of aggravation and mitigation and any other subjective features.

[66] In the case of the former Vice-President of Fiji the trial judge adopted a starting point of 6 years but in the case of the other three who were convicted with the Vice-President, her starting point was 4 years. This latter figure was not affected by impermissible matters of aggravation and should be adopted as the starting point for the Petitioner as well. If this is done and the other findings and reasons of the trial judge are applied to it the result is a sentence of 4 years' imprisonment. This should be substituted for that imposed by the trial judge.

[67] The following orders are made:

(1) Special leave granted to appeal from the sentence. Petition otherwise dismissed.

(2) Sentence of 6 years' imprisonment imposed by the trial judge is quashed.

(3) In lieu thereof, the Petitioner is sentenced to 4 years' imprisonment to date from 6 April 2004.

Petition dismissed.