IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)

CR NOS. 422/2008, 1016/2008 AND 1017/2008

THE QUEEN

v

TEMU OKOTAI, RUHAU TAMAUNU AND MATAIO JOHNSON

Date: 4 April 2011

Counsel: Solicitor-General Mr T Elikana and Ms King for Crown
Mr N George for R Tamaunu and M Johnson
Mr W Rasmussen for T Okotai

Minute: 4 April 2011

RULING OF HUGH WILLIAMS J

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N George, Norman George & Associates, Avarua, Rarotonga (lawman@oyster.net.ck)
Mr Rasmussen,

[1] At the conclusion of the Crown case against the three accused, Messrs Mataio Johnson, Ruhau Tamaunu and Temu Okotai, applications were made by counsel for the charges against their clients to be dismissed on the grounds that there was insufficient evidence to permit the charges to continue.

[2] Messrs Johnson and Tamaunu are charged under s 225(2) of the Crimes Act with endangering transport on 13 May 2008 at Tukao, Manihiki. The charge against Mr Johnson is that he intentionally and in a manner likely to injure or endanger the safety of any person, did an act namely digging holes on the Manihiki Airport on that day. Against Mr Tamaunu it is asserted that the act he did was the planting of an uto, or coconut plant on Manihiki Airport. The accused Mr Okotai is charged with inciting or counselling Mr Johnston to commit the offence of endangering transport, namely an Air Rarotonga aircraft.

[3] As mentioned, the charges are brought under s 225 which relevantly reads:

> 225. **Endangering transport** – (1) Every one is liable to imprisonment for a term not exceeding fourteen years who, with intent to injure or to endanger the safety of any person, -
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> (a) removes anything from or places anything on, in, over, or under any place, or any area of water, that is used for or in connection with the carriage of persons or of goods by land, water, or air; or
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> (b) does anything to any property that is used for or in connection with the carriage of persons or of goods by land, water, or air; or
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> (2) Everyone one is liable to imprisonment for a term not exceeding five years who, intentionally and in a manner likely to injure or endanger the safety of any person, does any of the acts referred to in subsection (1) of this section.

[4] For Messrs Johnson and Tamaunu, Mr George argues that under the current state of the evidence the acts which they are said to have undertaken were not 'proximate'. They were too remote in time and circumstance and were mere

preparation for the commission of the offence charged. He also argues that it was impossible for the offence to be committed. Mr Rasmussen for Mr Okotai subscribes to Mr George's arguments, and adds that on the evidence to date his client did nothing which might amount to the type of endangering transport particularised in the Informations against Messrs Johnson and Tamaunu.

[5] Put briefly at this point, the facts are that the Manihiki Airport was intended by the Government of the day to be upgraded, but the Government wished to take action concerning the tenure of the Airport land before expending money on its improvement. The evidence currently does not show how the Airport, which has existed for a number of years, was able to be constructed on land which it is common ground was owned by a number of the Manihiki residents, including Messrs Johnson and Tamaunu. It is clear that the upgrade proposal was one which caused significant agitation amongst some of the landowners of Manihiki.

[6] Prior to 13 May 2008, the date on which the offence is said to have occurred, there had been public meetings on Manihiki at which opponents of the upgrade and those supporting it had expressed their views. The evidence suggests that the landowners, at least, wished there to be more time to discuss the land issues before any official intervention to progress the upgrade in the hope that those discussions would either resolve the outstanding issues or at least prepare the way for a Land Court hearing.

[7] Just what applications had been made and by whom concerning the upgrade is not in evidence, but it is reasonably clear from the evidence that at the public meetings held in the days prior to 13 May 2008, amongst others Messrs Johnson and Tamaunu had expressed an intention, should the Land Court progress towards a hearing on Manihiki, to go onto the Airport, dig holes in the runway, plant uto and thus prevent the aircraft on which Ministry of Justice officials and the Land Court Judge were flying, from landing.

[8] Early on the morning of 13 May 2008 the evidence shows that nothing untoward had occurred in relation to the Airport but at a point in time not entirely precisely established by the evidence, the accused Messrs Johnson and Tamaunu

and a third person went onto the Airport with the Police following them and commenced to dig a couple of holes in the middle of the runway and to plant uto in at least one of them. As it turns out, fortunately, the accused, under Police persuasion, removed the uto and filled in the holes and it seems that shortly afterwards the disturbance was compacted by Manihiki Airport Authority officials. Messrs Johnson, Tamaunu and the Police then went to Mr Johnson's house where they remained for several hours.

[9] In the meantime, the aircraft had left Rarotonga Airport for its intermediate stop at Aitutaki and at 8:27 am taxied along the runway at Aitutaki and took off for Manihiki. Usually the flight to Manihiki takes about 2 hours and 40 minutes. When the pilot, Captain Haupini, was approaching the halfway point of the journey - about the point of no return- he was in contact with Air Rarotonga and the Police and made a decision, for the safety of the passengers, crew and the aircraft to turn the plane around and return to Rarotonga. The precise times involved in that part of the case are not all precisely established.

[10] It remains on the facts to say that at some stage while the parties mentioned were at Mr Johnson's house there was a telephone call to Mr Johnson from the accused Mr Okotai who during that call also spoke to a Detective. Currently the evidence suggests that Mr Okotai may have been against Messrs Johnson and Tamaunu going onto the runway and digging holes, but may have suggested that the state of local agitation was such that other Islanders should drive their trucks onto the runway in order to effect the same purpose, namely preventing the flight landing with the Ministry of Justice officials, the Land Court Judge and others on board.

[11] The crucial question in relation to the application to discharge the accused at this stage of the trial is when an offence under s 225 is complete as a matter of law.

[12] It is clear that in order to succeed in an application to dismiss the Crown must prove three elements:

a) The first is that the accused did one of the acts referred to in s 225, and here subsections 1(a) and (b) are relevant.

b) Secondly, the Crown must prove the act or acts were done intentionally; and,

c) Thirdly, it must prove that the act or acts were done in a manner likely to injure or endanger any person.

[13] There can be little doubt in this case that, at least at this stage of the trial, there is common ground that Messrs Johnson and Tamaunu's actions were done intentionally. Indeed they signified their intention to do what ultimately they did on the morning of 13 May at the public meetings held a day or so beforehand, and made it clear to the Police on that morning that that was their intention.

[14] Also, there can be no contest to the question as to whether they removed anything or placed anything or did anything to property used for or in connection with the carriage of persons or goods by air. It was made clear by the pilot that safety of aircraft, passengers and crew is a paramount consideration in the operation of air flights, and that the digging of holes in runways, even though later filled in and compacted, involves the significant possibility of danger to aircraft and therefore to its passengers. That, similarly at this stage of the trial, would seem to raise at least a prima facie case that the actions of Messrs Johnson and Tamaunu were done in a manner likely to injure or endanger any person. It is significant that s 225(2) does not require proof of actual injury or actual endangerment but simply a likelihood that injury or danger may ensue, that is to say that injury or danger is proved to be more than a fanciful possibility.

[15] Returning to when the offence is complete, the Solicitor-General, Mr Elikana, submitted that the doing by an accused of an act listed in s 225(1) must be the point at which the offence is complete. In the Court's view that must be correct. It is the doing of the act listed in s 225(1) with the requisite intent and likelihood that constitutes the offence of endangering transport and is the mischief against which the section has clearly been enacted. As shown by Robertson J et al in Adams on Criminal Law, (Volume 1 page 1I 107 in the edition current before 2003) when the New Zealand, s 203 was in precisely the same terms as s 224, the reference in the section is to 'act only' and accordingly if a person does an act with the necessary

intent and likelihood the doing of that act of itself constitutes at least a prima facie case.

[16] That proposition is illustrated by the English decision in *R v Pearce*,[1] where the accused disrupted a railway signalling system by stealing some of the copper wire by which it operated. The signal person was able to overcome the problem by manually operating the signals, but the thief of the copper wire was held properly guilty of endangering transport in that case because he was guilty of removing the copper wire and that completed the offence.

[17] Translating here to the facts of this matter and the terms of s 225 it is clear that the accused Messrs Johnson and Tamaunu dug holes in the runway and planted uto in them. Those actions were actions which came within the acts listed in s 225(1) as mentioned. It was clearly done intentionally and it was done in a manner which unless corrected was likely to injure or endanger any person. Also relevant in this context, although in a different statutory context, are the remarks of the New Zealand Court of Appeal in *Civil Aviation Department v MacKenzie*,[2] which held that offences involving flying are public regulatory offences where a strict approach to interpretation may be mandated.

[18] The consequence of that finding is that the application to dismiss the charges against Messrs Johnson and Tamaunu must itself be dismissed because on the current state of the evidence in law the offence with which they are charged under s 225(2) was complete on their performing the act listed in the particulars in the Informations against them, namely the digging of the runway holes and the planting of the uto.

[19] As far as Mr Okotai is concerned it is of importance to the decision on whether he should be discharged at this stage of the case to focus on the terms of the Information against him.

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[1] *R v Pearce* [1967] 1 QB 150.

[2] *Civil Aviation Department v MacKenzie* [1983] NZLR 78.

[20] As mentioned, he is charged with inciting or counselling Mr Johnson to commit the offence of endangering transport. Notably the Information contains no particulars of the offence of endangering transport. Had it been particularised to cover the evidence to date that he was against the digging of holes and planting uto, but may have been in favour of the driving of trucks onto the runway, then there may have been more force in the application to discharge at this point.

[21] But there is nothing on the file to suggest that counsel for Mr Okotai sought – as he might well have done - particulars of the means by which Mr Okotai is said to have counselled or incited the commission of the offence of endangering transport. Accordingly he cannot plead that because he did not counsel or incite the commission of the offence of endangering transport by digging or planting as particularised against Messrs Johnson and Tamaunu On the form of the Information against him his application for the Court to hold that no case exists against him must be dismissed.

[22] Seen against the test in *Flyger* that an Information should not be taken away from the jury and charges dismissed unless no jury properly directed could possibly convict the accused, the only appropriate conclusion to reach is that all three applications for discharge at this stage should be rejected.

[23] Two postscripts are important. The first is that, as noted during argument, the fact that as a result of the Police intervention the damage done by Messrs Johnson and Tamaunu to the runway was negatived and obliterated and the Airport rendered safe so that the aircraft may have been able to land without incident is a potent factor which the Court may take into account in sentencing the accused should their conviction follow. But it is not a factor which bears on when the offence charged is complete and whether the state of the evidence to date satisfies the legal requirements for conviction.

[24] The second postscript is that a great deal of the evidence to this point - principally the cross-examination - has been directed to the land disputes in Manihiki which preceded 13 May 2008 and resulted in the actions taken by the accused on that date. At best for the accused, it would seem debatable whether any of that

evidence is relevant given that the offence against Messrs Johnson and Tamaunu has been held to be complete on the digging of the runway holes and the planting of the uto, and the fact that those actions were likely to injure or endanger persons, namely the passengers and crew on the flight. Why Messrs Johnson and Tamaunu took the actions they did is accordingly almost wholly irrelevant. What motivated them is similarly almost wholly irrelevant, and it must follow that a lot of the cross-examination as to what preceded the digging and planting and, more particularly, what followed the digging and planting is similarly irrelevant. Licence having been given to try to discern the emergence of a defence, consideration must now be given as to whether any further evidence can be given concerning land issues.

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Hugh Williams J