

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

CR NO's 308-315/20

PAUL RAUI ALLSWORTH

v

**HENRY TUAKEU PUNA
&
MARK STEPHEN BROWN**

Hearing date: 15 to 19 March 2021

Counsel: Mr N George for Informant Allsworth
Messrs K Raftery QC & B Marshall for defendant Puna
Messrs K Raftery QC & T Arnold for defendant Brown

Oral Judgment: 19 March 2021

Date of this summary: 1 April 2021

SUMMARY OF JUDGMENT OF HUGH WILLIAMS, CJ

[0103.dss]

Introduction

[1] In this private prosecution the informant went to trial on two pairs of informations alleging that the defendants, Messrs Puna and Brown, respectively the former and present Prime Ministers of the Cook Islands in the days immediately following General Election held on 14 June 2018 conspired with each other by deceit or other fraudulent means to defraud the Crown and thus commit offences against s 280 of the Crimes Act 1969 by:

- (a) Chartering an aircraft paid for under the Civil List Act 2005 to transport the newly elected Member of Parliament for Pukapuka-Nassau, Mr Tingika Elikana together with the former MP for Pukapuka, Mr Tekii Lazaro and their wives to Rarotonga when none were entitled to free air transport under the Civil List Order 2009/04¹; and
- (b) Chartering an aircraft under the Ministry of Health Medivac scheme under the false pretence of a sick patient evacuation, Mr Willie John, former MP for Penrhyn, when the purpose of the flight was alleged to be to uplift Mr Robert Tapaitau, the newly MP for Penrhyn and his wife to secure his support for the Cook Islands Party²

[2] On 19 March 2021, after four days of evidence, it was held that neither defendant had a case to answer in response to all four informations and it was therefore appropriate to acquit them on all charges and find them “not guilty”.

[3] A full transcript of the oral judgment delivered on 19 March 2021 is in the course of preparation, but a summary of the judgment has been requested.

Elements of “conspiracy” and “fraudulently”

[4] Proof of a conspiracy between the defendants was fundamental to all informations as was the necessity to prove that the defendants’ actions were undertaken fraudulently.

[5] A criminal conspiracy is a common intention in the minds of the conspirators and the manifestation of that intention by mutual consultation and agreement among them with a common design to commit a substantive offence, with the agreement remaining in operation until ended by performance, abandonment or any other manner by which agreements are discharged.

¹ “The Pukapuka flight”; CRN 311 & 315/20.

² “The Penrhyn flight”; CRN 310 & 314/20.

[6] “Fraudulently” requires proof of an intention on the part of the defendants to act deliberately and with knowledge they are acting in breach of their legal obligations with the defence of honest belief in departing from strict legal obligations being available, even if the honesty of the belief was a mistaken one.

The Pukapuka flight

[7] In relation to the Pukapuka flight, not only was there no allegation that the defendants conspired with each other in relation to approval of that flight and its funding under the Civil List Order 2009/04, and not only was the informant’s assertion unfounded that the flight was arranged to console and pacify Mr Elikana on missing out on a Cabinet post – the allegation was firmly rebuffed by Mr Elikana in evidence – it was clear that, although the flight was financed from the Civil List, by the time it took place Mr Elikana had been declared the Member of Parliament for Pukapuka-Nassau pursuant to a declaration under Section 78 of the Electoral Act 2004 and he and his wife were accordingly entitled as an MP to have the flight paid for under the Civil List Order 2009/04.

[8] In relation to the Pukapuka flight, the informant principally relied on a Cabinet memorandum dated 28 June 2018 which was signed by the two defendants and a subsequent Cabinet minute.

[9] While the memorandum was proof of the defendants’ common intention that the flight should be arranged and paid for at public expense, there was no evidence of any intention on the part of the defendants to commit an offence, namely an offence under s 280 of the Crimes Act 1969.

[10] While the evidence suggested that Mr and Mrs Lazaro may not have been entitled to their passage from Pukapuka-Rarotonga being at public expense, it was clear that payment of Mr and Mrs Lazaro’s fare was due to a common misinterpretation of the provisions of the Civil List Act 2005 and the Civil List Order 2009/04 which had persisted over a number of General Elections.

[11] Accordingly any mistaken belief on behalf of the defendants in relation to the funding of Mr and Mrs Lazaro's flight, even if mistaken, occurred through an honest belief on the defendants' part.

[12] There being no allegation of conspiracy on the part of the defendants in relation to the Pukapuka flight and no proof that it was approved and publicly funded pursuant to an agreement between the defendants to commit an offence under s 280 of the Crimes Act 1969 or that the mistaken funding of Mr and Mrs Lazaro's flight was caused other than by an honest mistake in the interpretation of the relevant legislation, there was no case for the defendants to answer in relation to either information relating to the Pukapuka flight and the charges were accordingly dismissed.

The Penrhyn flight

[13] The Penrhyn flight was organised by the Ministry of Health under its non-emergency Medivac scheme to transport Mr Willie John from Penrhyn to Rarotonga in the days following the Section 78 Declaration declaring Mr Tapaitau the successful candidate for the Penrhyn seat.

[14] While Mr John had been the unsuccessful Cook Islands Party candidate for the Penrhyn seat, that was coincidental. He had suffered a foot injury about a fortnight before the General Election, it had turned septic, penicillin did not appear to be effective and, as an uncontrolled diabetic, it was the medical opinion that he was in danger of requiring amputation of the foot were he not transferred to Rarotonga for more intensive treatment than was available on Penrhyn.

[15] The Penrhyn flight was organised by the Ministry of Health – not by Parliamentary Services, still less by either of the defendants – and, in accordance with common practice, the availability of other seats on the flight was widely notified in order to defray part of the cost.

[16] Following the Section 78 Declaration of 28 June 2014, Mr Tapaitau, elected as an independent MP, had been negotiating with both the Cook Islands Party and the

Democratic Party to secure concessions which he thought would be to the best advantage of the electors of Penrhyn, his supporters and himself. It was only after his arrival in Rarotonga on the Penrhyn flight that he finalised his negotiations with the Cook Islands Party and entered into a coalition agreement with them.

[17] Accordingly, there was no proof of the defendants' involvement in the organisation of the Penrhyn flight, there was no proof of any conspiracy on their part in relation to the flight, still less that any agreement between them was to commit a substantive offence under s 280 of the Crimes Act 1969 in relation to the organisation of the flight and its being paid for by the Ministry of Health Medivac scheme.

[18] Similarly, there was no proof that any actions on the part of the defendants in relation to the Penrhyn flight were undertaken fraudulently in the sense of being undertaken in breach of the defendants' legal obligations. They, along with the Democratic Party, were legitimately negotiating with Mr Tapaitau so there was no proof the defendants' actions were undertaken fraudulently.

[19] The informations alleging breach of s 280 Crimes Act 1969 in relation to the Penrhyn flight were accordingly dismissed, there being no case for the defendants to answer.

Summary

[20] On 19 March 2021 it was held that neither defendant had a case to answer in relation to any of the four informations on which the informant had gone to trial and accordingly all four informations were dismissed and both defendants were found "not guilty" on the four charges they faced.

A handwritten signature in black ink, appearing to read 'H Williams', written in a cursive style. The signature is positioned above a horizontal line.

Hugh Williams, CJ