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IN THE FIJI COURT OF APPEAL

At Suva

Criminal Jurisdiction

CRIMINAL APPEAL NO. 16 OF 1991
(High Court Criminal Appeal No. 27 of 1990)

BETWEEN:

THE STATE	APPELLANT
- and -	
AFASIO MUA HIAGE APAU JIOJI AISEA FREDI EMOSI UAFTA VERESONI ELARIO VISESIO MUA IANE SAVEA	RESPONDENTS

Mr. I. Mataitoga for the Appellant
Mr. T. Fa for the Respondents

Date of Hearing : 5th June, 1992
Date of Delivery of Judgment : 27th November, 1992

JUDGMENT OF THE COURT

The Respondents to this appeal were convicted of sedition in the District Officer's Court in Rotuma and appealed under section 308 of the Criminal Procedure Code to the High Court. There were lengthy grounds of appeal but the Learned Judge, Scott J, saw them as fitting logically into three groups and dealt with them in that way. He allowed the appeals on each of these groups.

One of the grounds included in group 2 was the original ground 13 that the magistrate had erred by misconstruing the meanings of discontent and disaffection and their application in the case. In dealing with it, Scott J considered the intent necessary in sedition and concluded it includes an intention to incite violence.

The Learned Director of Public Prosecutions now appeals under section 21(2)(a) of the Court of Appeal Act on the single ground:

> *"That the Learned Judge erred in law in holding that a charge of Sedition preferred under section 66(1)(a) and 65(1)(iv) of the Penal Code, Cap. 17, requires the prosecution to prove "incitement to violence" as an ingredient of the offence."*

As the appeals also succeeded on other grounds, whatever the result of this appeal, it cannot affect the Respondents' position. However, the Director is concerned to have this aspect of the law clarified.

The charges in this case were laid under section 66(1)(a):

> *"66 (1) any person who -*
>
> *(a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention;*
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> *(b) ....*
>
> *(c) ....*
>
> *(d) ....*
>
> *is guilty of a misdemeanour ...."*

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A seditious intention is defined in section 65 and it is convenient to quote the whole section:

> *"65 (1) A "seditious intention" is an intention -*
>
> *(i) to bring into hatred or contempt or to excite disaffection against the person of Her Majesty, Her heirs or successors or the Government of Fiji as by law established; or*
>
> *(ii) to excite Her Majesty's subjects or inhabitants of Fiji to attempt to procure the alteration, otherwise than by lawful means, of any matter in Fiji as by law established; or*
>
> *(iii) to bring into hatred or contempt or to excite disaffection against the administration of justice in Fiji; or*
>
> *(iv) to raise discontent or disaffection amongst Her Majesty's subjects or inhabitants of Fiji; or*
>
> *(v) to promote feelings of ill-will and hostility between different classes of the population of Fiji.*
>
> *But an act, speech or publication is not seditious by reason only that it intends -*
>
> *(a) to show that Her Majesty has been misled or mistaken in any of her measures; or*
>
> *(b) to point out errors or defects in the government or constitution of Fiji as by law established or in legislation or in the administration of justice with a view to the remedying of such errors or defects; or*
>
> *(c) to persuade Her Majesty's subjects or inhabitants of Fiji to attempt to procure by lawful means the alteration of any matter in Fiji as by law established; or*

(d) to point out, with a view to their removal, any matters which are producing or having a tendency to produce feelings of ill-will and enmity between different classes of the population of Fiji.

(2) In determining whether the intention with which any act was done, any words were spoken, or any document was published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself."

The seditious act charged was a meeting on 15th April 1988 and in dealing with it, the learned Judge, at p.18 of his judgment, considered the meaning of sedition in Fiji.

"The dilemma which has faced the courts in other jurisdictions is this : What limits are imposed on the freedom of expression by the law of sedition given the fundamental freedom of expression enshrined in the constitution?

As previously mentioned, the 1970 Constitution was abrogated on 7 October 1987. On 1 February 1988 section 12 of the 1970 Constitution was replaced by section 11 of the Protection of Fundamental Rights and Freedoms of the Individual Decree 1988. This Decree is therefore the relevant protective law for the purposes of this appeal although by virtue of its similarity with the parallel provisions in the Constitutions much of what is hereinafter set out will apply to all three documents.

.... It is clear that if a literal interpretation of section 65 is adopted then very substantial inroads on the freedom of expression guaranteed by the Decree and by the 1970 and 1990 Constitutions would be the result .... Two views of the meaning and effect of section 65 may be taken and these correspond to the two views which have been taken of the scope and limits of the laws of sedition as existing in countries with Penal Codes similar to our own.

The first view is that the Penal Code represents a complete and comprehensive statement of the law of sedition and must be interpreted in its own terms free from any glosses or interpolations derived from any expositions however authoritative of the law of other jurisdictions. .... The inevitable effect of adopting such an approach would in our view be to accept the very substantial inroads into the freedom of expression guaranteed by the Constitution and by the Decree to which I have referred.

The second view starts from the fundamental freedoms enshrined in the Supreme Law of the Nation (see Section 2 of the 1970 and 1990 Constitutions of Fiji) and proceeds to an interpretation of the law of sedition which enables the latter to be operated without doing violence to the overall purpose of the former. The consequences of adopting the second view are that before the offence of sedition can be made out it must be proved that there was an incitement to violence against an institution of the state."

He then considered a number of cases from other jurisdictions and concluded that the second view is correct for the reasons set out at pp 27 - 30 which can be summarised:

"1. The Penal Code of Fiji which predates both Constitutions and the Decree must be interpreted in their light and so as not to do violence to their plain meaning. The need for consistency between the Penal Code and the Supreme Law of the State is particularly evident.

2. If the first view were to be taken then it would be impossible for a citizen of Fiji to know with reasonable precision where the limits on his freedom of expression lay. It need hardly be stated that such a situation is quite unacceptable. .... I am of the opinion that to adopt such an approach, however consistent it may be with the approach adopted by other jurisdictions (see E.G. R. v. Sullivan (1868) 11 Cox CC 44, 45) is to place a gloss upon the words of the Section which is precisely what, on the first view of the meaning of the Section, is not allowed.

3. Section 3 of the Penal Code, the interpretation section, reads as follows:

> *"This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England and expressions used in it shall be presumed, so far as is consistent with their context, and, except as may be otherwise expressly provided, to be used with the meaning attaching to them in English Criminal Law and shall be construed in accordance therewith."*

Now, although there is in England no Code offence of sedition, the basic question as to when behaviour becomes seditious is in both jurisdictions the same. The object both of Common Law and the Penal Code is to prevent public mischief while at the same time allowing legitimate dissent. .... It seems to me that the correct approach, bearing in mind the difficulties involved in the alternative view, is to interpret section 65 in a way which both accords with the interpretation of the English courts and which avoids the uncertainty to which I have already referred.

4. The result of the judicial interpretation of the Law of Sedition by the highest courts overseas has been in the great majority of cases to restrict its operation to instances of incitement to violence against this State or its institutions. The leading authority is Boucher v. The King (1951) 2 DLR 369 wherein is to be found the most complete analysis of the nature and history of the development of the law of sedition. .... In that case the Supreme Court of Canada concluded that proof of an intention to promote feelings of ill-will and hostility between different classes of subjects did not alone establish a seditious intention. .... To constitute sedition the Court held that there had to be proof of incitement to violence for the purpose of disturbing constitutional authority."

Despite the careful reasoning of the Judge, this Court cannot accept his conclusion. There are, we feel, two main grounds of objection to the course he followed.

The first is that the basic rule of interpretation of a statute is that the Courts must construe plain words in their

natural and ordinary sense. It is only if that is not possible that the Court should move on to consider any other basis for interpretation. That rule applies in England and Fiji. The learned Judge's reference to section 3 of the Penal Code takes it too far. The purpose of that section is to describe the principles of interpretation and construction of expressions in the Code. It is not authority for the proposition that the scope and extent of the offences themselves must be presumed to be the same as in English Criminal Law. The words in section 65(1)(iv) are, in our opinion, clear and unambiguous and we cannot accept that section 3 means they must be extended because recent (and earlier, inconsistent) English cases have extended them.

We do not feel there is any difficulty with the words "to raise discontent or disaffection" used in section 65(1)(iv). The learned Judge quotes the definition of disaffection from the Oxford English Dictionary as "political alienation or discontent, a spirit of disloyalty to the Government or existing authority." Rich J in the Australian case of Burns v. Ransley (1959) CLR 101 at 112 considered disaffection "connotes enmity and hostility, estranged allegiance, disloyalty, hostility to Government" and this was adopted by the Nigerian Federal Court in DPP v. Chike Obi (1961) ANLR 186. With respect, we agree and a reading of the judgment in the High Court would suggest Scott J agreed also.

What he did to justify his interpretation of the words to include an incitement to violence was to consider the constitutional protection of freedom of expression and this brings us to our second point of disagreement.

In describing the second view, he suggests the law of sedition be interpreted in a way that does not do violence to the protective provisions of the Constitution. The consequences are, he concludes, that the State must prove an incitement to violence (by which he presumably means an intention to incite violence) before the offence can be made out. The leap from the conclusion in the first sentence to that in the second is not explained other than by the fact that courts in other jurisdictions have reached the conclusion incitement to violence is an essential ingredient.

It is, of course, correct that where the Constitution is the Supreme law, the Courts must be careful to see that the working of the statutes does not do violence to the Constitution. As the learned Judge said, the need for consistency between the Penal Code and the Supreme Law of the State is particularly evident.

Although the Director has pointed out, in our opinion correctly, that the Protection of Fundamental Rights and Freedoms of the Individual Decree, 1988, did not have the supremacy of the earlier and present Constitutions, we feel the point should still be considered on the basis of a supreme

constitution because the words of section 11(1) and (3)(a) of the Decree which applied at the time of the incident and were considered by the Judge are almost identical to section 13(1) and (2)(a) of the present Constitution.

> *"13(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.*
>
> *(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provisions -*
>
> *(a) in the interests of defence, public safety, public order, public morality or public health;*
>
> *(b) ....*
>
> *(c) ....*
>
> *(d) ....*
>
> *except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."*

The learned Judge's conclusion was that a literal interpretation of section 65 would result in very substantial inroads on the freedom of expression guaranteed by the Decree and by the 1970 and 1990 Constitutions.

There can be no argument that there will be inroads. Any restriction on totally free speech and expression is an inroad as, for example, is censorship of offensive language in

films and the criminal offence of using abusive language, but, with respect, the question is not whether there is a restriction but whether the restriction is contrary to the Constitution.

It is usual in many constitutions for the protective clauses to declare the fundamental freedoms but then impose limitations in the wider public interest. The Constitution of Fiji does the same. Section 13(2)(a) clearly provides that laws that make provisions in the interest of public order shall not be held to be inconsistent with or in contravention of the section. Sedition is an offence against public order.

That decides the appeal and this Court does not need to consider whether the facts found by the lower Court amounted to sedition in that case.

However, we are compelled to observe that, whilst sedition is a widely drawn offence, the erosion of the freedom of expression is modified by the defences in paragraph (a) to (d) of section 65(1)(a)-(d). Before a Court can convict, it must first look to the intent of the person committing the act charged. If that amounts to one or more of the intentions in section 65(1)(i)-(v) the Court must then consider if paragraphs (a)-(d) may apply.

The purpose of the offence is to prevent any unlawful attacks on the tranquility of the State but it is not intended

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to prevent legitimate political comment. Deeply held political convictions frequently provoke strong emotions but there is authority to show that even strong or intemperate words or actions may not demonstrate a seditious intention if done with the purpose of expressing legitimate disagreement with the government of the day in terms of paragraphs (a)-(d). When determining that, the Courts should always be reluctant to extend any inroads on the protected constitutional freedoms. They should look at alleged seditious actions with a free, fair and liberal spirit. Those words were used by Fitzgerald J in directing the jury in R v. Sullivan (1868) 11 Cox 44 at 59 and he continued:

> *"You should recollect that to public political articles great latitude is given. Dealing as they do with public affairs of the day - such articles if written in a fair spirit, and bona fide, often result in the production of great public good.*
>
> *Therefore, I wish to remind you to deal with these publications in a spirit of freedom and not view them with an eye of narrow criticism..... I ask you to view them in a broad and bold spirit, and give them a liberal interpretation."*

That case concerned political publications but the same approach applies to political actions and is the test to be used. The Court should bear in mind that genuine political dissent is often the ground from which democracy grows and always be vigilant that a charge of sedition is not used simply as a means to suppress it. For that reason the Court should

always consider whether paragraphs (a)-(d) apply in any charge of sedition.

The appeal is allowed on the single ground that the learned Judge erred in law in holding that a charge of sedition preferred under Section 66(1)(a) and Section 65(1)(iv) of the Penal Code, Cap. 17 requires the prosecution to prove an incitement to violence.

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Mr. Justice Michael Helsham
President, Fiji Court of Appeal

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Sir Moti Tikaram
Resident Judge of Appeal

.....
Mr. Justice Gordon Ward
Judge of Appeal