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IN THE HIGH COURT OF FIJI
AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 16 OF 2006

BETWEEN:

SITIVENI LIGAMAMADA RABUKA

Applicant

AND:

STATE

Respondent

Counsel: Mr. P. Maiden SC)
Mr. P. Sharma) – for the Applicant
Ms Tamanikaiwaimaro)

Mr. M. Tedeschi QC)
Mr. R. Gibson) – for the State
Mr. A. Ravindra-Singh)

Date of Hearing: Monday 13th November, 2006
Date of Ruling: Tuesday 14th November, 2006

RULING - MISTRIAL

[1] The accused by counsel makes an application for mistrial seeking dismissal or permanent stay. This application was lodged in the Criminal Registry at 9.43am yesterday.

[2] Argument commenced at 11.30am until the luncheon adjournment then resumed shortly thereafter. I am dictating this decision for delivery early tomorrow morning. I have not had the ability to consider much of the jurisprudence. I wish to acknowledge at the outset the content of three papers I have read from His Honour Justice Spigelman, The Chief Justice of New South Wales. The latest delivered at the Media Law Resource Centre Conference in London on the 20th of September 2005. "The principle of open justice a comparative perspective". This is available at the New South Wales Supreme Court Website www.lawlin.nsw.gov.au/sc.

Background

[3] In a letter received on the 5th of October 2006 the Manager of News, Current Affairs and Sports for Fiji Television wrote with a request to cover the proceedings of the High Court Trial of Sitiveni Rabuka, live. A copy was sent to both counsel and a reply sent to the applicant that the matter was under consideration.

[4] There is no law in Fiji covering such applications. Draft guidelines have been discussed but not adopted by the courts. In their absence I thought it prudent to adopt the in court media coverage guidelines developed by the Institute of Judicial Studies in New Zealand. A copy of the guidelines was sent to the DPP and Mr. Rabuka's counsel. Those guidelines contain an application form to be completed by applicants. This was sent to Fiji Television with a request that it be completed and returned.

[5] At the time the defendant's lead counsel was Mr. D. Sharma from Suva. At a Case Management Meeting on the 5th of October the matter was discussed and it was agreed that it would be raised again at the pre-trial conference on the 16th of October. On that day when the matter was called the Director of Public Prosecutions advised that the intra-office computer network was off-line. They sought and were granted an adjournment of that pre-trial conference to Thursday the 19th of October at 8.45.

[6] At that conference Mr. Sharma did not appear. In the intervening period it transpires that he had become seriously unwell. Ms Tamani from his office appeared. The contents of a letter to the DPP was discussed and also the application from Fiji TV. The State at that time indicated that they were happy with the standard conditions of coverage provided in the New Zealand guideline. They had concerns about the

availability of witness protection and were adamant that there was to be no filming of assessors.

[7] Ms Tamani did not feel confident in confirming Mr. Sharma's earlier instructions and so requested and was granted an adjournment of the pre-trial conference to Monday the 23rd of October. At the resumed conference again a number of matters were discussed in relation to correspondence but on the subject matter of the Fiji TV application it was adjourned to the 25th of October at 9.30. The court was advised by then that Mr. Sharma had become seriously ill and counsel wanted the comfort of confirming her instructions.

[8] On the 25th of October there was a lengthy pre-trial conference. The pre-trial conference was adjourned to 2.15 where the Fiji TV application was raised. The accused and defence indicated their consent to full coverage of court proceedings and so a letter was sent from the Registry to Fiji Television confirming that. However, the consent was subject to the conditions of that full coverage being agreed. Counsel requested that these conditions be discussed at a round table conference with the applicant. This was arranged for the 27th of October at noon.

[9] That conference could not proceed and so was adjourned to the 31st of October at 11.30am.

[10] My records of that conference are that the State and the accused by their counsel said they did not object to the application made by Fiji Television to carry live coverage of this trial subject to conditions. The conditions were discussed. The agenda for those was the standard conditions for television coverage developed in the New Zealand guideline for court media coverage. Each of the sixteen (16) conditions was raised in turn and considered. I ticked each condition as it was agreed.

[11] The New Zealand guideline contemplates that where the parties consent a decision on the papers is appropriate. As there was no opposition to the application and as I accepted the argument raised by the applicants concerning the principle of open public and therefore fair justice seen to be done in combination with television coverage providing the best outreach for the wide geographical spread of Fiji. I decided television

coverage was the best option to meet those ends of justice. I advised all present of my decision.

[12] There was a final pre-trial conference on the 2nd of November. The early part of that conference was convened with the production team from Fiji Television. It was short. It dealt with practical matters concerning the coverage. Counsel present agreed that they would liaise with the media on a daily basis at 9.00am concerning that day's proceedings and provide them with advice on matters such as anticipated witnesses, the likelihood of voire dire applications and any witness and anonymity applications. I was only to be advised of any disputes that may require resolution.

[13] I have detailed the matter in this way because during the course of this hearing senior counsel for the accused said the defence had not consented to live coverage.

[14] In that regard there was disagreement between junior counsel for the DPP and the accused. Affidavits were filed but in the end did not have to be reverted to as the parties agreed to a consent position which was "the defence neither consented nor opposed the suggestion of a TV camera in the courtroom. Written conditions were invited. No written submissions on those conditions were made by the defence".

[15] The last comment on these factual matters that should be recorded is that when senior counsel arrived in the country from Australia there was a short pre-trial meeting at which Mr. Maiden SC raised some concerns about television coverage but did not press those or make a formal application to interdict the coverage.

[16] I inferred that he had been briefed by his junior counsel and was content with arrangements that had been made. That day an abuse of process application commenced. As this was a chambers matter it was not filmed. I ruled against the defence on the Thursday morning and the trial proceeded on the morning of Friday the 10th of November.

[17] No applications were made about the television coverage. If there had been I would have addressed the application before commencement of the trial.

[18] That night in reliance on the application as granted subject to the sixteen (16) conditions Fiji Television ran news stories and coverage of the day's proceedings on Friday relating to the preliminary address to the assessors and opening address of counsel on Saturday, the evidence in chief of Lieutenant Colonel Seruvakula, the State's prime witness.

[19] I remind myself that this is a criminal trial involving the rights of the accused. The decisions made on his behalf or the actions of his representation are less relevant. Accordingly, despite the earlier consent of the parties and lack of application to interdict the Television Coverage from the defence it is still Mr. Rabuka's fair trial rights that I keep in mind.

The Law

[20] The principle of open justice is most frequently expressed in the form of a quote attributed to Lord Chief Justice Hewart from his Lordship's judgment in ***R v Sussex Justices Ex parte Macarthy*** [1924] 1 KB 256 at 259.

> ***"It is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done."***

[21] The principle of open justice has long been known to both common and constitutional law and is often expressed in different ways. Another articulation was that of Lord Atkin who once said: ***"Justice is not a cloistered virtue"***

[22] In 1936 the Privy Council applied the principle in an appeal from the Supreme Court of Alberta, which had set aside orders dissolving a marriage on the basis that the trial of the divorce action had not been in open court. The Privy Council said:

> [*McPhersan v McPhersan* (1936) AC 177.200]:
> **"Publicity is the authentic hallmark of judicial as distinct from administrative procedure ... The court must be open to any who may present themselves for admission. The remoteness of the possibility of any public attendance must never by judicial action be reduced to the certainty that there will be none."**

[23] The significance of this function was well expressed by Chief Justice Burger, in the landmark decision of *Richmond Newspapers v Virginia* [448 US 444 (1980) at 571-572]:

> "Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done - or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner." It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process "satisfy the appearance of justice", and the appearance of justice can best be provided by allowing people to observe it.
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> .....
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> People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case."

The Principle and the Media

[24] The principle raises many issues about the administration of justice relevant to the media at the transect between the human rights of open justice and fair trial. It is for that reason that the common law has developed a series of elaborate procedures restricting the flow of information that is made available to jurors. Indeed, most of the law of evidence is concerned to exclude evidence so as to ensure a fair trial where the tribunal of fact is a jury. It is an essential characteristic of a fair trial that the jurors decide the case upon the evidence that is allowed to be adduced in the trial and which has been

tested in accordance with the common law mechanism of trial, particularly by the legal representatives of the accused. Whether this is called due process or natural justice, there is no more fundamental rule in our procedure, especially in our criminal procedure. I do not think any common lawyer would believe that a fair trial could be said to have occurred unless this rule was observed [per Spigelman J (supra)].

[25] However, that right of due process must live alongside the right of open justice. In *R v Legal Aid Board Exparte Kaim Todner* (a firm) [1999] QB 966 at 977, Lord Steyn observed:

> "A criminal trial is a public event. The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process. Moreover, the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the value of the rule of law."

I agree.

[26] As Justice Spigelman observes (supra)

> "The extent to which the principle of a fair trial may conflict with the principle of open justice will be determined by a judgment as to the ability of a jury to set aside irrelevant considerations in the course of its deliberations. This is a matter on which judges will have a range of different views. I have often expressed the view that the tendency to regard jurors as exceptionally fragile and prone to prejudice is unacceptable. I based this on a considerable body of experience of trial judges to the effect that jurors approach their task in accordance with the oath they take and that they listen to the directions they are given and implement them".

With respect, I agree.

Consideration

Fiji Television Has Breached and the Standard Conditions for Television Coverage Conditions

[27] In paragraph 10 of his submissions learned counsel identifies three perceived breaches in the conditions of coverage. I accept these perceptions may have come from his failure to appreciate that the original application made to the court was to cover the proceedings live subject to a ten-minute delay restriction.

[28] These are the plain terms of Condition 12. That was the basis of discussions with his junior counsel.

[29] I find it is clear that when taken in combination with paragraph 13 any film can be broadcast live or at any time subject only to the conditions marked A to D.

[30] I find the conditions have not been breached. I do, however, remind Fiji TV of them.

Insufficient Direction

[31] It was then submitted that the directions given in my opening to the assessors were insufficient as despite the emphatic warning given be influenced by what they see and hear either from television or from third parties not involved in the proceedings.

[32] My opening remarks to the assessors in this regard were:

> You will no doubt you'll hear that this matter has attracted a degree of pre-trail publicity. You will no doubt be aware that the Accused has some certain notoriety in Fiji and the Pacific. In this room, in criminal trials, you are to completely ignore his notoriety. You are to completely ignore any trial publicity. That's Pre-trial publicity or publicity during the trial. Obviously this matter is going to attract a lot of media attention. I am not asking you to turn the television set off and ignore the radio and not to read newspapers for the next two weeks or so. What I am saying to you is that what you read in the newspapers, what you see on the television set, what you hear on the radio, what you know about this matter, what you know of the notoriety of the Accused is completely irrelevant. The only thing that counts is the evidence that you hear and see in this trial and that is all. It is imperative that you lay any sympathy or prejudice or pre-conceived notions about this matter or the Coup of 2000, the Mutiny at the Queen Elizabeth Barracks to one side.
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> You are here to judge a citizen of this State. He is here and he is entitled to the equality of us all. Concentrate on the evidence in this trial and only what's said here, what's produced

here, what's seen here. That's the evidence for you and upon which you form your opinion disregard everything else.

I also need to tell you that these proceedings are being filmed but I am ordering that you are not to be filmed. I am ordering that you are not to be photographed. I am ordering that you are not to be reported on by any mean, that is Television, Radio or Newspapers throughout the course of this trial. That is one of the reasons you have the grey board placed where it is. So you can have my assurance that you are here to concentrate on the task in hand and that is to consider the evidence and to consider the guilt or innocence of this man in accordance with the principles of the Law that you hear about throughout the trial. Now you can take your own notes, if you want to.

And later you are not to make your own enquiries about this matter that would be quite inappropriate. Just listen to the evidence and judge the facts that you see and here in this trial. During the trial obviously friends and family will be concerned to know how things are going. I need to say this strongly, it is none of their business. If anyone approaches you and asks you about the case, you are to tell a member of my Court staff straight away.

This is not a matter for anyone else except you, your own good conscious and your own good judgments. No one else has any right to interfere with that. Can I give you this advice, you should not discuss the case amongst yourselves unless all of you are present. And also this, if you are out of the assessors room, 2 or 3 or more of you and you decide for example have a coffee or maybe take some lunch together. Do not discuss the case because you will be overheard and people will misinterpret what you say. Leave your considerations for the assessors room and leave those considerations for when you all are together. Please keep an open mind until you have heard everything and then decide. Listen to the State's case, listen to the defence case, listen to my summing up and then form your conclusion.

[33] I record the direction was delivered emphatically. I am satisfied that it was a sufficient direction in the circumstances. As is my practice I am likely to repeat the direction again during the course of trial and re-emphasize it in my closing address.

[34] I do not accept that assessors directed in that way would be unable to either comprehend or obey such a judicial direction.

[35] Accordingly, I reject that ground.

Assessor Influence

[36] Counsel then submitted a further miscarriage of justice may result in the assessors placing a disproportionate weight on the opening address and the evidence of Lt. Colonel Seruvakula.

[37] I prefer the submissions of learned counsel for the Prosecution that there is nothing to stop the print media repeating every word uttered in court, the only limitation being the availability of printing space in the publication.

[38] The broadcast was of vision and sound taken directly from the trial. It was exactly what the assessors saw in real time. Technology makes that possible. I find there is little logic in an argument that seeks to confine coverage of a trial to print as opposed to visual or voice media.

[39] I am of the view that such material is less prejudicial then edited newspaper reports, counsels opening or closing addresses where they summarize the facts of the case to their parties best advantage, or indeed a request to clarify or repeat evidence during the course of trial in reliance on a judge's notes. In my view access to real time broadcast is reliable and therefore is not especially prejudicial or damaging to an assessor's judgment.

[40] The assessors have been warned that the trial is on-going. They have been told to keep an open mind. If the broadcast is now maintained under the existing conditions then they will not doubt have the ability to view cross-examination and opening and closing addresses of counsel for the defence thereby balancing any information they may have seen.

Witness Effect

[41] The next issue raised in the application is the effect on potential witnesses. It was submitted that a real time broadcast of the proceedings could somehow prepare witnesses to give tailored evidence.

[42] Subject to the accepted codes of professional conduct and ethical obligation counsel frequently rehearse the witness's testimony before his evidence is given. That rehearsal will often include material evidence given in trial.

[43] It is for that reason that cross-examination of witnesses will frequently contain credibility challenges against rehearsal, tailoring or recent fabrication of evidence.

[44] It is not uncommon for witnesses to seek to refresh their memories from statements that they have made prior to court proceedings.

[45] The remedy lies in cross-examination. If a witness has departed or materially added to out of court statements earlier given they can be subject to cross-examination and comment in both addresses and summing up.

[46] Counsel was asked to specify the witnesses he placed in this category.

[47] He emphasized those that were surrounding Col. Seruvakula at the times he received the two telephone calls on the 4th of July and the 2nd of November.

[48] I have ruled that evidence of the Colonel's reactions and what he said immediately after those phone calls forms part of the res gestae and is admissible.

[49] As such those witnesses might be called to confirm that the alleged telephone calls did actually occur and might repeat the exclamation made by the Colonel immediately after the call or describe his reactions upon receiving the call to confirm not the truth of what was said but the fact that it was said immediately after the receipt of a telephone call from the accused.

[50] Each of those witnesses has made detailed statements. Their evidence is however, what they give in court. That evidence is subject to cross-examination. If the witness is inconsistent or exaggerates from earlier statements I am quite satisfied that the defence counsel may cross-examine on that point and emphasize it in his address in the usual manner. That said I am satisfied that the type of evidence given is anticipated to be brief and not same long narrative. The letter perhaps being more susceptible to talking than the former.

[51] I do not find that circumstance to be a miscarriage of justice to warrant a mistrial.

Sequestration

[52] It was argued by counsel that live coverage of real time court proceedings, particularly in the United States, occurs only in those jurisdictions where the jury , as assessors are sequested and cloistered away from media.

[53] Counsel further submitted in his experience it was usual for any film to be released only by the commission or tribunal and some control to be exercised on what it was intended to be shown.

[54] In terms of the latter point the control has already been exercised by the court in the imposition of the sixteen (16) conditions for broadcast. The arrangement for real time television coverage with the broadcast of what has actually been said only then requires consideration of the issue of balance.

[55] As the permission to film and televise the proceedings was granted for the duration of the trial there is in my view an internal balance that reflects the ebb and flow of the trial itself.

[56] Again I have faith of the ability of assessors to render a true opinion based on the material they have seen and heard in court. I do not accept the argument that their individual opinion will be necessarily assisted or contaminated by viewing actual live coverage of the proceedings.

Internet

[57] Counsel was concerned at the availability of film coverage on the internet. He submitted that the use of the film in that way was not anticipated by the application. He was concerned that such recorded live footage would be widely available. It could be an additional influence on the assessors in breach of the accused's fair trial rights.

[58] It could affect witness testimony. The cases I have reviewed (referred to by His Honour Justice Spigelman) concern the use of the internet by jurors to conduct inquiries independent of the court proceedings such as criminal record searchers as opposed to simply viewing a media news site.

[59] In my view, these two situations are quite distinct. I would of course accept that experimentation and enquiry independent of the trial process may lead to a miscarriage of justice. I do not for my part accept that reviewing a media news site on the internet will affect the findings of an assessor. In that regard I reiterate both the original warning given to the assessors during my opening remarks and my view that assessors can be trusted to reach a decision based on judicial direction.

[60] However, counsel is correct in that the original application did not contemplate publication on the internet as distinct from broadcast on television. As this has been drawn to my attention I order that Fiji TV delete the existing internet content and refrain from using the internet as a means of publication of the images and sound captured at trial.

The Accused's Right

[61] I return now to consideration that this is the accused's right to a fair trial. If as a result of a misunderstanding between himself and his counsel he now wishes to withdraw his previously given consent for direct trial coverage or seeks to alter the conditions under which broadcast was granted. What is to be done ?

[62] I turn again to the New Zealand guidelines. They contemplate that the judge may at any time revoke authority to cover a trial if:

(a) the media applicant or someone acting on behalf of the media applicant breaches these guidelines or any condition of the grant of authority to cover the trial; or

(b) the judge determines that the rights of any participant in the trial or the accused's right to a fair trial may or will be prejudiced if coverage continues; or

(c) coverage of the trial is disrupting the proceedings.

[63] I remain content to entertain any application for revocation of the authority given to cover the trial or variation of the conditions concerning that coverage at anytime. If that is the case and such an application is received notice will be given to the media applicant and I will grant them leave to appear in person by representative or by counsel.

Conclusion

[64] The application for mistrial is refused. The trial will resume. I do, however, make this observation and it is directed towards the print media. As part of their case the defence submitted the photocopy of the front page of the Fiji Daily Post of Saturday the 11th of November 2006 proclaiming a banner headline "Kill him Rabuka wanted Frank killed court heard". I consider that reporting to be intemperate and I urge the Editor of the newspaper to exercise more diligence and care in the preparation of copy and reporting on the trial. I direct the Registrar to communicate this warning to the Editor.

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Gerard Winter
JUDGE

At Suva
Tuesday 14th November, 2006