

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 361 of 2016

STATE

v.

- 1. JOSAIWAQABACA**
- 2. ANARE RAVULA**
- 3. FRED WESLEY**
- 4. HANK ARTS**
- 5. FIJI TIMES LIMITED**

Counsel:

Mr. L. Burney, Mr Y. Prasad for State
Mr Ravindra Singh A. for Accused 1
Mr D. Sharma for Accused 2
Mr P. P. Sharma for Accused 3
Mr P. P. Sharma for Accused 4
Mr P. P. Sharma for Accused 5

Ruling:

11th December 2017

RULING

[On Interpretation of main elements of Seditious Intention]

Introduction

1. The second, third, fourth and fifth accused persons filed this Notice of Motion pursuant to Section 290 of the Criminal Procedure Act, seeking a pre-trial order to clarify the legal test to be applied for Seditious Intention under Sections 66 (1) (v) and 67 of the Crimes Act. Moreover, during his oral submissions, the learned counsel for the second accused invited the court to properly determine the main elements of the offence of Seditious Intention as it would assist the parties during the hearing.

2. The notice of motion was heard on the 7th of December 2017, where the learned counsel for the prosecution and the defence made their respective oral arguments and submissions. Beside the oral submissions, the learned counsel for the second accused and the prosecution tendered their respective written submissions during the course of the hearing. Having carefully considered the respective oral and written submissions of the parties, I now proceed to pronounce my ruling as follows.

Background

3. The learned counsel for the second accused submitted that the court must adopt the common law test as outlined in Boucher v R (1951) 2 DLR 369 in order to define the seditious intention. He proposed that the proof of an intention, to promote feelings of ill will and hostility between different classes of the population, does not alone establish a seditious intention. The prosecution has to prove an intention to incite violence, and also such violence or resistance or defiance, for the purpose of disturbing constituted authority of the government.
4. The learned counsel for the third, fourth and fifth accused persons adopted the submissions made by the learned counsel for the second accused.
5. The prosecution submitted that the Section 66 of the Crimes Act gives a complete statement of the seditious intention, hence, the common law approach as outlined in Boucher v R (supra) has no relevance in Fiji. The learned counsel for the prosecution relied on State v Mua (1992) FJCA 23:AAU0016u.91s (27 November 1992), State v Niudamu [2017] FJHC 145: HAM30.2017 (27 February 2017), where the Fiji Court of Appeal and the High Court of Fiji respectively refused to adopt the common law test on Seditious Intention.
6. Section 67 of the Crimes Act stipulates the offence of Sedition, where it states that:
 1. *A person commits an indictable offence (which is triable summarily) if the person —*

- 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;*
- b) *utters any seditious words;*
- c) *prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication; or*
- d) *imports any seditious publication, unless he has no reason to believe that it is seditious.*

7. The prosecution has charged the five accused persons under Sections 67 (1) (a) and 67 (1) (c) of the Crimes Act.

8. Section 67 (1) (i) to (v) defines the seditious intention, where it states that:

A "seditious intention" is an intention —

- i) *to bring into hatred or contempt or to excite disaffection against the Government of Fiji as by law established; or*
- ii) *to excite the 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 the inhabitants of Fiji; or*
- v) *to promote feelings of ill-will and hostility between different classes of the population of Fiji.*

9. This court, in its ruling dated 27th of July 2017, held that the offence of Seditious constitutes physical and fault elements. Accordingly, in order to find an accused guilty for seditious, the prosecution has to prove beyond reasonable doubt, the existence of relevant physical and fault elements of the offence of seditious. (vide Section 14 of the Crimes Act).

Fault Element of the Offence

10. The learned counsel for the second accused proposed to adopt the test enunciated in **Boucher (supra)** in order to determine the seditious intention. Accordingly, the prosecution has to establish not only the intention to promote feelings of ill will and hostility among different classes of the population, but also the intention to incite violence.
11. According to Section 133 (4) the Criminal Code of Canada, (presently Section 59 (4) of the Criminal Code) the sedition intention has been defined as:

“Without limiting the generality of the meaning of the expression “seditious intention” everyone shall be presumed to have a seditious intention who publishes, or circulates any writing, printing, or document in which it is advocated, or who teaches or advocates, the use, without the authority of law, of force, as a means of accomplishing any governmental change within Canada”.

12. Accordingly, it is clear that the seditious intention defined under the Canadian Criminal Code is different to the definition given under the Crimes Act.
13. The Privy Council in **Wallach Johnson v The King (1940) A.C.231** has discussed the scope of the offence of Sedition and the Seditious Intention, as defined under the Criminal Code of the Gold Coast (West Africa) with the common law approach on seditious intention. The seditious intention under the Criminal Code of the Gold Coast is similar to the Seditious intention as defined under Section 66 (1) of the Crimes Act. The Privy Council found that, the sections of the Criminal Code of the Gold Coast that has defined the seditious intention are clear and unambiguous. Incitement to violence is not a necessary ingredient of the crime of Sedition, and the Criminal Code nowhere requires proof from the words themselves of any intention to produce such a result.

14. The Fiji Court of Appeal in *State v Mua (supra)* found that the prosecution is not required to prove an incitement to violence as an ingredient of the offence under the Sections 66 (1) (a) and 65 (1) (iv) of the Penal Code.
15. In view of the reasons discussed above, I find that the prosecution is not required to prove the intention of incitement to violence in order to establish the seditious intention, as defined under Section 66 (1) of the Crimes Act.

Physical Elements of the offence

16. I now draw my attention to the physical elements of the offence of sedition.
17. The learned counsel for the second accused submitted that the Crimes Act has not given any definition for "Seditious Act" and "Seditious Publication". Hence, the learned counsel invited the court to outline a definition for the physical elements of the offence of sedition.
18. Fitzgerald J in Reg v Sullivan (1868) 11 Cox 44 has given a comprehensive definition of sedition, where it was held that:

"Sedition is a crime against society, nearly allied to that of treason, and it frequent precedes treason by a short interval. Sedition in itself is a comprehensive term, and it embraces all those practices, whether by word, deed, or writing, which are calculated to disturb the tranquility of the State, and lead ignorant persons to endeavour to subvert the Government and the laws of the empire. The objects of sedition generally are to induce discontent and insurrection, and stir up opposition to the Government, and bring the administration of justice into contempt"

19. Justice Shameem in State v Riogi (2001) FJHC 61; HAA 00601,2001s (20 August 2001) has adopted the above definition of Fitzgerald J in *Sullivan (supra)*. The Fiji Court of Appeal in *State v Mua (supra)* has also adopted the views expressed by Fitzgerald J in *Sullivan (supra)*.

20. Kellock J. in his judgment in **Boucher (supra)**, has quoted a passage from Lord Cockburn's "*Examination of Trials for Sedition in Scotland*" in order to identify the targeted objects of the sedition. The said passage from Lord Cockburn states that:

"To give the attack the quality of seditiousness, it must be capable of being justly viewed as a contempt of public authority. Hence, the usual objects of the offence are, the sovereign, the houses of parliament, the administrators of justice, public officers and department wielding and representing the State's power or dignity. It is the public majesty that must be assailed, and that must be required to be protected".

21. Accordingly, the offence of Sedition is a crime against the State and its authority. It attacks the tranquility of the state and its authority. Hence, the expected purpose of the offence of sedition is, to prevent any unlawful attack on the tranquility of the state. The Fiji Court of Appeal in **State v Mua (supra)** has specifically stated this purpose in the following manner.

"The purpose of the offence is to prevent any unlawful attack on the tranquility of the state, but it is not intended to prevent legitimate political comment"

22. Bearing in mind the purpose and scope of the offence of sedition, I now turn onto determine the applicable approach in defining the meaning and scope of the physical elements of sedition as outlined under Section 67 of the Crimes Act. In doing so, it is prudent to understand the historical development of this offence over the passage of time. In his dissenting judgment in **Boucher (supra)** Justice Taschereau has discussed the changes of approaches in defining the sedition over the time, where his Lordship has expounded that:

"The crime of seditious libel is well known to the common law. Its history has been thoroughly examined and traced by Stephen, Holdsworth and other eminent legal scholars and they are in agreement both in what it originally consisted and in the social assumptions underlying it. Up to

the end of the 18th century it was, in essence, a contempt in words of political authority or the action of authority. If we conceive the governors of society as superior beings, exercising a divine mandate, by whom laws, institutions and administration are given to meant to be obeyed, who are, in short, beyond criticism, reflection or censored upon them or what they do implies either an equality with them or an accountability by them, both equally offensive. In that lay sedition by words and the libel was its written form.

But constitutional conceptions of a different order making rapid progress in the 19th century have necessitated a modification of the legal view of public criticism; and the administrators of what we call democratic government have come to be looked upon as servants, bound to carry out their duties accountably to the public. The basic nature of the common law lies in its flexible process of traditional reasoning upon significant social and political matter; and just as in the 17th century the crimes of seditious libel was a deduction from fundamental conceptions of government, the substitution of new conceptions, under the same principle of reasoning, called for new jural conclusions".

23. Above passage of Justice Taschereau has explained the changes in the scope of application of sedition in the legal domain, consequent to the transformation of mode of governance from absolute monarch to the rights base constitutional democracies. Advent of the more comprehensive international human rights instruments and right basis constitutional regimes, specially during the second part of last century, have dramatically altered the application of offences that naturally target the tranquility of State and its authority. This has widened the scope of fundamental and constitutional rights of people. A vibrant democracy needs active, inclusive and comprehensive participation of people. Hence the widening of the scope of such rights, specially freedom of expressions, thought and political activities are quintessential in order to achieve such inclusive participation in progressive democracy.

24. The nature and purpose of the offence of sedition is capable of limiting the freedom of expression and speech of the people. In the meantime, absolute freedom of expression and speech could possibly endanger the very existence of the state and its authority which the people have chosen through the exercise of their democratic will. Hence, International Human Rights Instruments and also many modern jurisdictions have recognized the importance of permissible limitation of the freedom of expression and speech.

25. Article 19 of the International Covenant of Political and Civil Rights states that:

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
 - a) *For respect of the rights or reputations of others;*
 - b) *For the protection of national security or of public order (order public), or of public health or morals.*

26. According to Article 19 (3) of the Covenant, the freedom of expression can be limited for the purpose of protecting the rights or reputation of others and for the protection of national security or public order.

27. The United Nations Human Rights Committee, in its General Comment 32 at the 102nd Session has outlined the responsibility of the State parties in limiting the freedom of

expression (<http://www2.ohchr.org/english/bodies/hrc/docs/ge34.pdf>) where it says that:

“Paragraph 3 expressly states that the exercise of the right to freedom of expression carries with it special duties and responsibilities. For this reason two limitative areas of restrictions on the right are permitted, which may relate either to respect of the rights or reputations of others or to the protection of national security or of public order (order public) or of public health or morals. However, when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The Committee recalls that the relation between rights and restriction and between norm and exception must not be reversed. The Committee also recalls the provisions of article 5, paragraph 1, of the Covenant according to which “nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant”.

Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality. Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.

28. Article 12 of the European Convention of Human Rights stipulates that:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”

29. Along with the international standards as stipulated under above international human rights instruments, Chapter two (The Bill of Rights) of the Constitution of Fiji 2013 has provided a comprehensive and inclusive regime of fundamental and constitutional rights with an effective and extensive mechanism of interpretation and enforcement. Section 17 of the Constitution deals with the freedom of expression, speech and publication, where it states that:

- (i) *Every person has the right to freedom of speech, expression, thought, opinion and publication, which includes—*
- a) *freedom to seek, receive and impart information, knowledge and ideas*
 - b) *freedom of the press, including print, electronic and other media,*
 - c) *freedom of imagination and creativity; and*
 - d) *academic freedom and freedom of scientific research.*

(ii) Freedom of speech, expression, thought, opinion and publication does not protect—

- a) propaganda for war;
- b) incitement to violence or insurrection against this Constitution; or
- c) advocacy of hatred that—

- (i) is based on any prohibited ground of discrimination listed or prescribed under section 26; and
- (ii) constitutes incitement to cause harm.

(iii) To the extent that it is necessary, a law may limit, or may authorize the limitation of, the rights and freedoms mentioned in subsection (1) in the interests of—

- a) national security, public safety, public order, public morality, public health or the orderly conduct of elections;
 - b) the protection or maintenance of the reputation, privacy, dignity, rights or freedoms of other persons, including—
 - (i) the right to be free from hate speech, whether directed against individuals or groups; and
 - (ii) the rights of persons injured by inaccurate or offensive media reports to have a correction published on reasonable conditions established by law;
 - c) preventing the disclosure, as appropriate, of information received in confidence;
 - d) preventing attacks on the dignity of individuals, groups of individuals or respected offices or institutions in a manner likely to promote ill will between ethnic or religious groups or the oppression of, or discrimination against, any person or group of persons;
 - e) maintaining the authority and independence of the courts;
 - f) imposing restrictions on the holders of public offices;
 - g) regulating the technical administration of telecommunications;
- or

h) making provisions for the enforcement of media standards and providing for the regulation, registration and conduct of media organizations

(iv) In this section, "hate speech" means an expression in whatever form that encourages, or has the effect of encouraging discrimination on a ground listed or prescribed under section 26.

30. The Fiji Court of Appeal in **Sate v Mua (supra)** found that Sedition, as stated under the Penal Code, is an offence against public order and does not contravene Section 13 of the Constitution of Fiji 1970 (the equivalent provision to section 17 of the present Constitution), where the Fiji Court of Appeal held that:

"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.

31. Justice Shameem in **State v Riogi (supra)** found that the offence of Sedition as stated under the Penal Code is an offence against public order and does not contravene Section 30 of the Constitution of Fiji 1997 (the equivalent provision to section 17 of the present Constitution), where her Ladyship held that:

"The offence of sedition, in that it requires proof of, inter alia, an intention to promote feelings of ill-will and hostility between different classes of the population of Fiji, does not therefore offend section 30 of the Constitution in principle, provided that a conviction for the offence is reasonable and justifiable in a free and democratic society." In giving effect to this proviso, the Courts can do no better than to give to sedition

offences, the free fair and liberal interpretation advocated by the Court of Appeal in State -v- Afasio Mua (supra).

32. The Fiji Court of Appeal in **State v Mua (supra)** has found that the basic rule of interpretation of statute is to construe the plain words in their natural and ordinary sense. The Fiji Court of Appeal in **State v Mua (supra)** has determined the constitutionality of the offence of Sedition pursuant to the provisions of the 1970 Constitution of Fiji.

33. Unlike the previous Constitutions of 1970, 1990 and 1997, the Constitution of Fiji 2013 has provided a comprehensive mechanism of interpretation of rights and their enforcement. Section 7 of the Constitution of 2013 has given an authoritative guideline to interpret the rights as stipulated under the chapter of Bill of Rights and also the laws that limit the rights, recognized under the chapter of Bill of Rights. Section 7 of the Constitution states that:

1. *In addition to complying with section 3, when interpreting and applying this Chapter, a court, tribunal or other authority—*
 - a) *must promote the values that underlie a democratic society based on human dignity, equality and freedom; and*
 - b) *may, if relevant, consider international law, applicable to the protection of the rights and freedoms in this Chapter.*
2. *This Chapter does not deny, or prevent the recognition of, any other right or freedom recognized or conferred by common law or written law, except to the extent that it is inconsistent with this Chapter.*
3. *A law that limits a right or freedom set out in this Chapter is not invalid solely because the law exceeds the limits imposed by this Chapter if the law is reasonably capable of a more restricted interpretation that does not exceed those limits, and in that case, the*

law must be construed in accordance with the more restricted interpretation.

4. *When deciding any matter according to common law, a court must apply and, where necessary, develop common law in a manner that respects the rights and freedoms recognized in this Chapter.*
 5. *In considering the application of this Chapter to any particular law, a court must interpret this Chapter contextually, having regard to the content and consequences of the law, including its impact upon individuals or groups of individuals.*
34. In view of Section 7 (3) of the Constitution, the court must construe the scope of the laws that have limited the rights set out in Chapter of the Bill of Rights, in a more restrictive manner, in order to minimize the possibilities of intruding into those rights. Therefore, I do not think the court could rely on the interpretation guidelines given by **State v Mwa (supra)** as it was made pursuant to the then Constitution of 1970.
35. In determining the appropriate approach of interpretation of the physical elements of the offence of Sedition, the remarks made by the Supreme Court of India in **Kadar Nath Singh v State of Bihar (AIR (1962) SC 955)** lend much assistance. I am mindful of the fact that **Kadar Nath Singh (supra)** has focused on both the seditious intention and the seditious act. However, I find the remarks made by the Supreme Court of India in **Kadar Nath Singh (supra)**, provides a useful guideline, in order to construct an appropriate approach of interpretation. The Supreme Court of India in **Kadar Nath Singh (supra)** held that:

"Any law which is enacted in the interest of public order may be saved from the vice of constitutional invalidation. If, on the other hand, we were to hold that even without any tendency to disorder or intention to create disturbance of law and order, by the use of words written or spoken which merely create disaffection or feelings of enmity against the government, the offence of sedition is complete, then such an

interpretation of the sections would make them unconstitutional in view of Article 19 (1) (a) read with cl (2). It is well settled that if certain provisions of law construed in one way would make them consistent with the constitution, and other interpretation would render them unconstitutional, the court would lean in favour of the former construction".

36. The Supreme Court of India in **Kadar Nath Singh (supra)** further held that:

"It is also well settled that in interpreting an enactment the court should have regard not merely to the literal meaning of the words used, but also take into consideration the antecedent history of the legislation, its purpose and the mischief it seeks to suppress."

37. If the court gives a more literally focused interpretation to the offences described under Section 67 (1) (a) and (c) as any act done or any publication published or printed, with any of the seditious intentions stipulated under Section 66 (1), constitute the offence of sedition, such an interpretation would have a wider possibility of intruding into the freedom of expression, speech and publication.

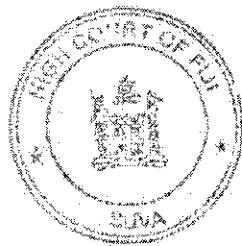
38. Taking into consideration of the interpretation guideline given under Section 7 (3) of the Constitutions, remarks made by the Supreme Court of India in **Kedar Nath Singh (supra)**, the diverse compositions of the populations of the Fiji, the purpose of the offence, and the expected adverse effects that the offence of sedition is intended to prevent, I find it is more appropriate to define the physical element of the offence of sedition based on the nature and the effect of the alleged physical act.


39. Accordingly, the prosecution has to establish that the accused has done an act in a nature to promote feelings of ill will and hostility between different classes of the population of Fiji. The prosecution is then required to establish that the said alleged act has a tendency or possibility or effect of creating public disorder, or disturbance of law and order, or subvert the authority of the government. Furthermore, it has to establish

that the accused had done such an act with any or more of the seditious intentions that have been defined under Section 66 (1) of the Crimes Act.

40. In this case, the prosecution has to first establish that the first accused has submitted an article written by him for publication, in a nature to promote feelings of ill-will and hostility between certain classes of the population of Fiji. Thereafter, the prosecution has to establish that the article with such a nature has a seditious tendency such as to create public disorder or disturbance of law and order, or to subvert the authority of the government. If the prosecution established the above ingredients, then it can be presumed that the accused had the necessary seditious intention when he had written and submitted the alleged article for publication, pursuant to Section 66 (2) of the Crimes Act.

41. Likewise, the prosecution has to first establish that the fourth and fifth accused persons had published and printed an article of a nature to promote feelings of ill-will and hostility between certain classes of the population of Fiji. Then to establish that article has a seditious tendency such as to create public disorder or disturbance of law and order, or to subvert the authority of the government. If the prosecution established the above ingredients, then it can be presumed that the accused had the necessary seditious intention when he had done the alleged act of publication or printing of the article pursuant to Section 66 (2) of the Crimes Act.




R.D.R.T. Rajasinghe
Judge

At Suva
11th December 2017

Solicitors

Office of the Director of Public Prosecutions for the State
Aman Ravindra Singh Lawyers for Accused 1
R. Patel Lawyers for Accused 2
Victoria Chambers for Accused 3, 4 and 5