STATE v ISOA RACEVA KARAWA

High Court Criminal Appellate Jurisdiction
Surman , J
2 October, 2000
HAA 061/00

Appeal against decision and order of Magistrates' Court – whether accused immune from criminal proceedings under Immunity Decree– whether parties given adequate and reasonable time to prepare submissions – whether respondent acting on the instructions of George Speight or not – role of DPP in instituting and conducting criminal proceedings – whether Court can take judicial notice of weapons handed in by reference to press reports - Immunity Decree 18/00 para 3(3); State Services Decree 6/00 clause 14(2); Penal Code s214; Emergency Decree ss9(1) and 25.

Respondent faced three charges of attempted murder and one of possession of firearms. Counsel asked for a ruling on whether the respondent was immune from prosecution which was hastily prepared and a ruling delivered. The State appealed on 9 grounds. The Court found that the respondent acted in excess of instructions given by George Speight for clearance of a road block.

Held – (1) the Magistrate erred in properly exercising his judicial discretion not to grant a longer adjournment to allow each party to prepare submissions on the effect of the Immunity Decree.

(2) alleged crime of attempted murder and possession of firearms without lawful excuse could not be described as 'political offences'.

(3) The DPP retained control of initiating and conducting criminal cases under the State Services Decree.

(4) Evidence of the return of weapons to the military was necessary and the court could not take judicial notice from press reports.

(5) The Muanikau Accord and the Immunity Decree are inextricably linked and there was a plain unambiguous intent that the Muanikau Accord is the precursor of the Immunity Decree and introduces the Decree as a specific and direct result of the agreement and conditions reached.

(6) A fundamental breach of the conditions of the Muanikau Accord will mean provisions of the Immunity Decree could not operate.

(7) The fact that the respondent acted in excess of instructions to clear a road block was of itself sufficient to exclude respondent from the protection of the Immunity Decree.

Proceedings against respondent to continue to trial.

No Cases referred to in judgment

Robert Shuster for the State
Kelemedi Bulewa for the respondent

2 October 2000. **JUDGMENT**

Surman, J

a This matter concerns an Appeal by the State against the Decision and subsequent Order made by the Chief Magistrate sitting at Suva on 21st July 2000. On that day the Magistrate decided that the Respondent (Mr. Karawa) was immune from criminal proceedings under the Immunity Decree (No. 18 of 2000) and ordered his immediate release.

b The Respondent had faced four Charges. Namely:

> 3 Charges of Attempted Murder contrary to Section 214 of the Penal Code; and one Charge concerning the Possession of Firearms contrary to Sections 9(1) and 25 of the Emergency Decree (as amended).

c The Particulars of the first three (3) Charges concerned alleged attempts to cause the deaths of three separate persons: Lt. Rokoura, Private Qerei and Mr. Jerry Hanes by the use of firearms. The 4th Charge concerned the actual possession of the Firearms on the same day – 27th May 2000.

d The Proceedings in the Magistrate's Court had a brief history. The Respondent (Mr. Karawa) appeared first before the Magistrate on 8th June 2000, when the Charges were readover and "not guilty" pleas entered. The Case was then adjourned to 22nd June 2000 and the Magistrate remanded the Respondent in custody. On 22nd June the State asked for a two week adjournment and the matter was put over until 6th July 2000.

e On that latter date (6/7/00) there was a further remand (this time at the request of Mr. Bulewa who now appeared for the Respondent). Case was adjourned to 20th July 2000 for mention, and it was on this day that the matter of Immunity was first raised, and those acting for the Respondent asked for a Court Ruling under the provision of the Immunity Decree.

f The Chief Magistrate asked for written submissions from both sides to be ready on the same day (20th July). Mr. Bulewa was asked to have his ready by 1.00pm supported by an Affidavit; the Director of Public Prosecutions to file a Reply supported by Affidavit by 4.00pm the same day. By any description this was an ambitious and hasty timetable set by the Magistrate and the Parties should have been given more time.

g The Ruling on Immunity given the following day by the Chief Magistrate had obviously been hastily prepared. I have certain sympathy with the Magistrate who obviously felt under pressure to hurry his decision and make a ruling. But this was unfortunate especially when the Director of Public Prosecutions had specifically asked for more time to consider the ambit (or scope) of the Immunity Decree. This matter of Immunity needed the most careful consideration – not a rush to judgment. Each Party should have been given adequate time to prepare their submissions. On the timetable extracted from the Magistrate's Record, and

which I have just outlined, it is plain that the Magistrate unfortunately failed to exercise fairly (or judicially) his discretion concerning the granting of an adjournment.

That deals with the First Ground of the Appeal.

I now turn to the remaining Grounds.

Ground ? – Whether Adequate and Reasonable Time to prepare Submissions

This is essentially linked with the first Ground of Appeal on which I have already observed and ruled.

Ground 3 – Whether Respondent was acting on the instructions of George Speight or not

To determine this Ground of Appeal reference must be made to the Immunity Decree paragraph 3(3) and to the Affidavit sworn by Mr. Speight on 20th July 2000. The sub-paragraph specifies that there will not be immunity in respect of acts done without the direction, orders or instructions of George Speight or any member of the Taukei Civilian Government.

Mr. Speight, in his Affidavit sworn on 20th July 2000 confirms that he "authorised" the removal of the Military Check Point at Vuya Road/Queen Elizabeth Drive, and he gave reasons for doing so. He specifies that the Respondent (Mr. Isoa Karawa) was a Member of the Group that went to the Check point to remove it. There is no mention that any instruction has been given to anybody by Mr. Speight to use firearms or to shoot at or near persons in the vicinity of the check point. It would have been a grotesque situation if any such specific order had been given. The contention by Mr. Speight that the Respondent himself was not responsible for the shooting or the use of firearms is a matter for the Court to decide when and if the Charges laid against the Respondent are tried.

In addition to the Speight Affidavit there was a concession made to this Court by Counsel appearing for the Respondent (no doubt on Instructions) that there was no Order made by Mr. Speight or his Associates to shoot at Personnel of the Fiji Military Forces or Citizen of the United Kingdom on 27th May 2000. I cannot accept the proposition that the alleged crimes of Attempted Murder and the Possession of Firearms without lawful excuse can be described as "Political Offences". This would be a distorted and entirely inappropriate description: even if the removal of the roadblock itself could be described as such under the Immunity Decree.

Ground 4 – The Role of the DPP to control Criminal Offences between 19th May and 13th July 2000

There was a submission by Counsel for the Respondent in the Court below that the question whether immunity was available under the Immunity Decree

"need not be decided by the DPP – but by the Court".

I detect there is a misunderstanding here about the role of the DPP in matters such as the ones we are considering today. In general terms the function of the DPP is to institute, undertake, carry on, or give advice or assistance in Criminal Proceedings which appear to be of importance or difficulty.

The Decree No.6 (State Services Decree) published by the Interim Military Government on 13th June 2000 defines the roles of various public bodies, including the Director of Public Prosecutions (DPP). Under the heading of "Functions of Independent Offices" at Clause 14(2) the Decree states (concerning the DPP).

> "...the DPP may institute and conduct criminal proceedings; the DPP may take over criminal proceedings that have been instituted (or started) by another person or authority..."

Given this definition – the DPP would of course be involved in these current proceedings, which are important (and arguably difficult or problematical). Of course the DPP and the Cases he conducts is subject to certain statutory provisions, including the provisions of the Immunity Decree.

The DPP in this matter brought these criminal proceedings against the Respondent to this Appeal. Prima facie the DPP was entitled/authorised to do that, subject to any subsequent ruling by the Court (after the DPP had been heard) that a person, such as the Respondent in this case, is immune from any particular proceedings.

But it is for the DPP to consider whether he should initiate Court proceedings bearing in mind the Immunity Decree. If the DPP takes the initial view that a Person is not entitled to Immunity under the Decree then he may decide to start the proceedings. Of course the Court can be asked by the Respondent or Defendant (as well as the DPP) to consider the matter of Immunity. The DPP is then bound (as are the other Parties) by any ruling of the Court.

In my judgment, subject to what I have just said, the Director of Public Prosecutions (by dint of the State Services Decree) retained control (concerning the bringing of Criminal Cases including this one) before the Court).

Ground 5 – Affidavit of George Speight and cross-examination thereon

It is not clear from the Magistrate's Notes whether there was any specific request made to the Magistrate by the DPP to cross-examine Mr. Speight. If such an Application is made then normally (although always at the discretion of the Judge or Magistrate) consent is given.

Given the concession made in Open Court by Counsel for the Respondent (Mr. Bulewa) about the "road block" operation on 27th May 2000, this particular ground of Appeal has been overtaken by events.

The short timetable promulgated by the Magistrate already mentioned

again under this heading has already been dealt with when considering Ground 1 of this Appeal.

Ground 6 – 'Judicial Notice' on the Surrender of Weapons

This Ground of Appeal caused some difficulty. The Courts can only take 'judicial notice' of matters which are so clearly established that formal evidence of their existence is unnecessary. In my view the Magistrate could not take 'judicial notice' of the disposal of weapons (especially not, as suggested, from press reports!). There had to be evidence to support the different contentions or submissions.

There was indeed such evidence contained in the Affidavit sworn by Colonel Tuatoka on 8th August 2000 and which was used to support the Notice of Appeal filed by the State on 9th August 2000. The penultimate paragraph of that Affidavit describes 27 weapons complete with serial Numbers which were known to be in control of the George Speight Group that had not (as at 8th August 2000) been returned to the Military.

I have received an Affidavit from Mr. Vakalalabure (a practising Barrister) (sworn on 27/9/2000) stating that an arrangement was made for the return of arms on 14th July 2000 and that to his knowledge all arms were returned by then.

But that last mentioned affidavit of Mr. Vakalalabure conflicts with that of Colonel Tuatoka (sworn nearly 4 weeks after the 14th July when all the arms were supposed to have been surrendered. I find as a fact for the purpose of this Appeal that all the Arms and Ordinance outstanding had not been surrendered by 8th August 2000. They had not been returned as soon as was practical. Colonel Tuatoka's affidavit also had particular significance in the context of the Muanikau Accord which I will refer to now in ruling on Ground 7 of the Appeal.

Ground 7 – Relationship of Muanikau Accord to the Immunity Decree

The Muanikau Accord (or Agreement) as the name implies was made at Muanikau, Suva on 9th July 2000. It was made between the Commander of the Fiji Military Forces (then Head of the Interim Military Government of Fiji) and George Speight, and endorsed by the signatures of each of them. The Accord is set in formal language. The first 16 Paragraphs (noted by letters A to P) set out the background of the situation in Fiji in chronological sequence from the 19th May 2000 (date of seizure of the then Prime Minister of Fiji and most of his Cabinet within the Parliamentary Complex) to the selection of an Interim Military Government on 4th July 2000.

The paragraphs that follow in the Accord Document set out the specific Agreements between the Parties: (that there would be :

(1) the release of the Political hostages then held in the Parliament Complex;

(2) the restoration of law and order;

(3) the return of all service personnel (to their barracks) and the return of arms, ordnance, and stores to the Royal Fiji Military Forces.

Then in the Accord, at the penultimate page, was the Agreement by the Head of the Interim Military Government with the George Speight Group to promulgate (publish) on 13th July 2000 a Decree of Immunity. This Decree was to grant immunity from prosecution to all persons who allegedly committed the offence of Treason in connection with the action of the George Speight Group between 19th May 2000 (the day of the takeover of the Parliamentary Complex and the detention of the Cabinet Members) and 13th July 2000. However, there were two important conditions for the granting of Immunity under the Decree:

(1) the release of the Political Hostages held at the Parliamentary Complex;

(2) and the return of arms, ordnance and stores to Royal Fiji Military Forces as soon as practicable after the release of the hostages.

In my judgment, there is a plain unambiguous intent that this Muanikau Accord or Agreement is to be the precursor of the Immunity Decree. The Accord sets out the agreement details and introduces the Decree as a specific and direct result of those agreements and conditions. There is no doubt that the Muanikau Accord and the Immunity Decree are inextricably linked.

The failure to return the Arms and Ordnance (Military Supplies and ammunitions) negated or nullifies the Immunity Decree.

The Submission has also been made that the 5th 'preamble' paragraph on page 1 of the Immunity Decree itself rehearses yet again the Conditions pertinent to the granting of Immunity – it is only after those conditions are met is the Decree to become effectivce.

Ground 8 – Failure by the Magistrate to consider the currency of the Decree when fundamental agreed conditions had not been met.

The State submits that if it is accepted that there has been a failure by either Party to meet the terms of the Agreement/Accord signed at Muanikau then the Immunity Decree is invalid.

This Ground of Appeal perhaps covers a wider submission than is strictly necessary for the Respondent in today's case.

Nonetheless if there has been a failure by the Speight Group to return all the weapons, ordnance and stores (spelt out in the affidavit filed on 8th August 2000 by Colonel Tuatoka) then, in my judgment, this will indicate a fundamental

breach of the Conditions of the Accord which in turn will mean the provisions of the Immunity Decree would not operate.

Ground 9 – Failure by the Magistrate to consider what is a reasonable time in the context of the endorsement of the Muanikau Decree on 9th July 2000 and the promulgation of Indemnity Decree on 13th July 2000.

This matter has been dealt with in my earlier findings.

Conclusion and Ruling

This Particular Appeal by the State must be allowed

The narrow reason that the Respondent (Mr. Isoa Karawa) acted in excess of the instructions given to him by the Speight Group for the clearance of the Road Block is by itself sufficient to exclude the Respondent from the protection or shelter afforded by the Decree of Immunity.

I should emphasise that this Ruling and the allowing of the Appeal by the State permits the Proceedings for the Respondent's Trial on the 4 counts on the Indictment to continue. It is not in any way an indication, nor can it be, of the Respondent's personal guilt or innocence; that can only be determined after the Trial has been completed.

Appeal allowed.

Marie Chan