STATE v VILIAME SAVU

HIGH COURT — CRIMINAL JURISDICTION

GATES J

14, 18, 22 November 2002

[2002] FJHC 73

Criminal law — information — motion to quash information — Misprision of Treason — elements of proof required — Criminal Procedure Code ss 108, 275.

Viliame Leqa Savu (accused) was charged with Misprision of Treason. He knew that George Speight and others intended to commit Treason and did not give information with all reasonable dispatch or use other endeavours to prevent the commission of the offence. The accused moved to quash the information for two reasons. First, the offence was obsolete and extinct. Second, the information was defective as it failed to set out an offence known to law. It also alleged that the acts do not constitute Misprision of Treason at the time it occurred.

Held — (1) The citizen's duty to disclose to the appropriate authorities any Treason or felony which he has knowledge remains the same and is still as binding upon him as it was in the early days of the common law. The citizen who fails in this duty when the public interest will be best served by the citizen will be prosecuted for Misprision of felony. There is certainly no justification for the view that such a prosecution is no longer available to the Crown.

R v Crimmins [1959] VR 270, considered.

(2) The existence of a public duty arose in Misprision of Treason where the nature of the offence was of the utmost gravity. It is plain that there is and always has been an offence of Misprision of felony and that it is not obsolete. It is true that until recently it has been rarely invoked but that is no ground for denying its existence. The arm of the law would be too short if it was powerless to reach those who are contact men for thieves or assist them to gather in the fruits of their crime or those who indulge in gang warfare and refuse to help in its suppression. There is no other offence of which such persons are guilty save that of Misprision of felony.

Sykes v Director of Public Prosecutions [1962] AC 528, considered.

(3) In the light of history, it is plain that there is and always has been an offence of Misprision of felony and it is not obsolete. It is true that until recently it has been rarely invoked but that is no ground for denying its existence.

Sykes v Director of Public Prosecutions [1962] AC 528, considered.

(4) Offences which are of such gravity and importance remain to be offences whether or not provided for by statute because of necessity.Some rights are so fundamental that they do not need to be stated or protected by a Bill of Rights or a Constitution. Similarly, some crimes are so heinous and dangerous to the State and its inhabitants that they need not be recorded in a statute book. Such is Treason and all the offences same to it..

Motion dismissed.

Cases referred to

Mulcahy v R (1868) LR3HL 306; *R v Damaree* (1709) Foster 213; 15 State Tr 521; *R v Hardy* (1794) 24 State Tr 199; *R v Hunt* [1987] AC 352; *R v Langhorn* (1679) 7 State Tr (NS) 417; *R v Scott* (1921) 86 JP 69; *R v Sumner* [1935] VLR 197; *R v Threlfall* (1914) 10 Cr App R 112; *R v Turner* (1816) 5 M & S 206; *Rajgopal*

Pillai v Reginam [1962] 8 FLR 163; *Rex v Mayhew* (1834) 6 Carrington & Payne 315; *Rohit Ram Lochan v State* Crim App No AAU0015/1996S (unreported); *Surend Pal Nandan v PIB* Crim App No 19/1983 (unreported); *Uganda v Commissioner of Prisons, Ex parte Matovu* [1966] EA 514; *Woolmington v Director of Public Prosecutions* [1935] AC 462, cited.

Chief Mliba Fakudze and 3 Ors v Minister for Home Affairs and 3 Ors Swaziland High Court Case No 2823/2000 (unreported); *R v Aberg* [1948] 2 KB 173; *R v Baird* (1820) 1 State Tr (NS) 1351; *R v Crimmins* [1959] VR 270; *R v Dowling* (1848) Cox CC 509; *R v Erasmus* [1923] AD 73; *R v Gallagher* (1883) 15 Cox CC 291; *R v Purchase* (1710) 15 State Tr 651; *R v Thistlewood* (1820) 33 State Tr 681; *Rex v Oliver* [1944] 1 KB 68; *Sykes v Director of Public Prosecutions* [1962] AC 528, considered.

State v Ratu Timoci Silatolu and Anor Misc Action No HAM002/2002S, approved.

P. Ridgway and *Solanki* for the State

A. Seru and *A. Wolf* for the Accused

Judgment

Gates J.

Ruling on motion to quash and on elements of offence of Misprision of Treason

[1] This ruling is concerned with two issues. First, the Accused moves to quash the information. Second, in response to my request, since it appears there has never been a prosecution in Fiji before today for the offence of Misprision of Treason, counsel have addressed me on the elements of proof required for such offence. I shall rule therefore on whether there is such an offence in Fiji and if so what elements are required to be proved by the state.

Motion to quash

[2] The Accused's motion to quash the information was filed on 13th November 2002. It is said to be made pursuant to ss 108 and 275 of the Criminal Procedure Code (CPC). Section 108 deals with bail applications and was amended by the CPC (Amendment) Act 1998 (No 37 of 1998). Bail does not arise here. The Accused is already on bail, and if there is no such offence as Misprision of Treason, the court will order the quashing of the information and discharge the Accused. It will not admit the Accused to bail since there will be no longer any information or charge remaining.

[3] In accordance with s 275 of the CPC, the Accused has filed a written statement for entering upon the record. Through his counsel, the Accused sets out in the statement the grounds for the motion and the relief sought. The motion is also said to be brought pursuant to Ch 4 of the Constitution, found in the Constitution (Amendment) Act 1997. The head note refers to ss 2(2), 3, 21, 23(1)(e), 28(1)(j) and 29(1).

[4] In summary, the motion claims the offence of Misprision of Treason is not an offence in Fiji today for two reasons. First, it is said the offence is obsolete and long extinct. Second, following the attainment by Fiji of independence in 1970 and republican status in 1990 [this may intend 1987], it is said the law in Fiji has not been amended to clarify who is to replace the British sovereign in the matter of allegiance. Because of these anomalies, it is said amendment cannot cure the information, it being defective in so far as it fails to set out an offence known to

law. Treason it is urged cannot still exist in Fiji without necessary amendments to the Penal Code, and if there is no Treason, it follows there can be no Misprision of Treason.

[5] It is also said that because the alleged omissions of the Accused could not constitute an act of Misprision at the time they are alleged to have occurred, they fall foul of s 28(1)(j) of the Constitution and do not constitute an offence now. Section 29 was submitted, but s 28 must have been intended here.

Misprision of Treason — The charge

[6] Section 52 of the Penal Code defines the offence as follows:

> *Any person who—*
>
> *(1) becomes an accessory after the fact to Treason; or*
>
> *(2) knowing that any person intends to commit Treason, does not give information thereof with all reasonable despatch to the Governor-General, the Minister or to a magistrate or police officer or use other reasonable endeavours to prevent the commission of the offence,*

is guilty of the felony termed Misprision of Treason, and is liable to imprisonment for life.

[7] Treason is defined in s 50:

> *Any person who compasses, imagines, invents, devises or intends any act, matter or theory, the compassing, imagining, inventing, devising or intending whereof is treason by the law of England for the time being in force, and expresses, utters or declares such compassing, imagining, inventing, devising or intending by publishing any printing or writing or by any overt acts or does any act which if done in England, would be deemed to be treason according to the law of England for the time being in force, is guilty of the offence termed treason and shall be sentenced to life imprisonment.*

By the Penal Code (Amendment) Act 2002 the previous sentence of death upon conviction for Treason has been reduced to life imprisonment.

[8] The information against the Accused reads:

> Statement of Offence
>
> MISPRISION OF TREASON: Contrary to section 52(b) of the Penal Code, Cap 17.
>
> Particulars of Offence
>
> VILIAME LEQA SAVU between the 18th day of May, 2000 and the 19th of May, 2000 at Suva in the Central Division, knowing that George Speight and others intended to commit treason did not give information thereof with all reasonable dispatch or use other reasonable endeavours to prevent the commission of the offence.

[9] It is plain from these particulars that part of the essential wording of the offence has been left out. It is not stated to whom the Accused omitted to give information. After "did not give information thereof with all reasonable despatch" and before "or use other reasonable endeavours …" there should be inserted the words "to the President, the Minister, or to a Magistrate or police officer". Without these additional words, the statement of offence is incomplete and defective. If this trial is to proceed, and prior to arraignment, I shall order amendment of the information as I have just indicated [s 274(2) CPC]. However, I shall hear from counsel first before deciding on the necessity for making such an order.

The nature of Treason

[10] The essence of Treason is betrayal. Jowitt in his Dictionary of English Law [vol 2, p 1776] said:

Treason, in its most general sense, is a crime committed by one person against another to whom he is bound by some tie of allegiance or subjection.

Originally Treason was a common law offence, but additional Treasons were brought into being by statutes from 1351–1795. The King's judges expanded the definition in order to advance the King's interest, since the convicted Accused forfeited his lands to the King, which caused the barons to press for a more restricted statute [see: Kenny's Outlines of Criminal Law, JWC Turner, 19th ed, pp 395–6.

[11] By the Treason Act 1351 five species of Treason were declared. They were:

If a man compasses or imagines the death of the sovereign, of his queen, or of their eldest son and heir; if a man violates the sovereign's companion (ie, his wife), or the sovereign's eldest daughter unmarried, or the wife of the sovereign's eldest son and heir; if a man levies war against the sovereign in his realm (after a battle has taken place, it is termed bellum percussum; before it, bellum levatum); if a man is adherent to the sovereign's enemies in his realm, giving to them aid or comfort in the realm or elsewhere; or if a man slays the chancellor, treasurer, or the justices assigned to hear and determine, being in their places doing their offices.

Further species have been created by subsequent statutes. Thus, it is Treason if a person endeavours to deprive or hinder any person, being the next in succession to the Crown, according to the limitations of the Act of Settlement, 1700, from succeeding to the Crown, and maliciously and directly attempts the same by any overt act: see the statute 1702, 1 Anne, st 2, c 9, s 3. It is also Treason if a person maliciously, advisedly, and directly, by writing or printing, maintains and affirms that any other person has any right or title to the Crown otherwise than according to the Act of Settlement, 1700, or that the sovereigns of this realm, with the authority of Parliament, are not able to make laws and statutes, to bind the Crown and the descent thereof (Succession to the Crown Act, 1706).

By the Treason Act, 1795, made perpetual by the Treason Act, 1817, compassing the death or injury of the sovereign, and expressing the same in writing or by any overt act, is made Treason. [Jowitt p 1776]

[12] Treason committed out of the British Dominions by virtue of the statute of 1543 was yet triable in the Queens Bench Division.

[13] Special requirements of evidence and procedure were provided for by legislation, such as the insistence on two witnesses for a conviction unless the prisoner were to confess his crime [s 2 Treason Act 1695], and entitlements to a copy of the indictment and lists of witnesses and jurors which were to be delivered to the Accused 10 days before his trial [ss 1 and 7 of the Treason Act and s 11 Treason Act 1708]. The Treason Act 1945 [s 1] did away with the special rules, and provided that procedure for Treason and Misprision should be the same as for murder trials [also s 12(4) of the Criminal Law Act 1967].

[14] The phrase taken from the 1351 Act that it is Treason to "levy war against our lord the King in his realm" has been given a wide interpretation. "War" has been interpreted to extend constructively to include forcible resistance to authority of the government in some public or general respect, or by an armed force whose purpose is to usurp the government in matters of a public and general nature [East CPC 72].

[15] "The obvious form of Treason under this head would be an insurrection against the authority of the sovereign. Enlisting and marching are sufficient overt acts without coming to an actual engagement": [Smith and Hogan, Criminal Law, 3rd ed, p 641]. But even a conspiracy to depose the King without more has been

held to be a sufficient overt act for Treason. [Fost 195; 1 Hawk c 17, ss 9, 27; *R v Langhorn* (1679) 7 State Tr (NS) 417 at 464; *Mulcahy v R* (2868) LR3HL 306]

[16] It is this limb of Treason, "the levying of war", with which we are concerned here. In *R v Thistlewood* (1820) 33 State Tr 681 at 683–4 Lord Abbott CJ, in his charge to the panel of the Grand Inquest in that trial, and in drawing attention to the Treason in question, said:

> *It is declared to be Treason, if a man…do levy war against his majesty within this realm, in order by force or constraint to compel him to change his measures or counsels; or in order to put any force or constraint upon or overawe both Houses or either House of Parliament, every person so offending shall be deemed and adjudged to be a Traitor…*

[17] In *R v Baird* (1820) 1 State Tr (NS) 1351 Clerk LJ in his charge to the jury said:

> *I state … that the assembling with force and arms of persons, whether in a greater or less number, with (the) object in view — the bringing about a radical reform in the Commons House of Parliament — is a direct levying of war against the King.*

[18] The words "levying of war" were held to be general and descriptive. Lord Coleridge CJ in a Treason felony trial, *R v Gallagher* (1883) 15 Cox CC 291 at 315 said:

> *It was obvious that war might be levied in very different ways and by very different means in different ages of the world.*

Previous definitions were found not to be exhaustive. It mattered not whether 3 persons or 3000 were engaged upon the conduct which might equally be described as "levying of war".

[19] In *R v Dowling* (1848) Cox CC 509 in his charge to the jury, Erle J said (at 514):

> *The meaning of the part of the 1st Count of the indictment, which charges the prisoner with the intention of levying war against the Queen, and compelling her by force to make the changes in the Constitution.…*

and further on:

> If you are satisfied that the prisoner has, with others, intended to use force to prevent the government from the free exercise of any of its lawful powers, the prisoner must be considered as having the intention under the statue to levy war against the Queen.

[20] And again:

> *That there should have been an actual conflict is unnecessary. The basis of the crime is the intent, and soon as such intent is evinced by acts the offence is complete, though no actual conflict has occurred. Much has been said respecting the similarity between the present offence and an ordinary riot. The distinction consists in the nature of the objects for which the parties assemble. If the purpose is a private one, the offence is a riot; but if the purpose is public and general, it is a levying war. The same assembly with the same arms might, by a mere difference in the intent with which such an assembly was convened be either a riot or a levying war. The object of the prisoner was alleged in the 1st Count of this indictment to be to compel the Queen by force to change her measures and counsels. If that is established to your satisfaction there can be no doubt that it was a public purpose, and that the offence bears no relation to that of riot. If, then, the prisoner's intent was to interfere by force in any way with the free action of the government; if the object was, for instance, to intimidate the government into granting the charter, or to obtain by violence and terror the repeal of the Act of Union*

between Great Britain and Ireland, or if the object was in any degree to interfere with the military posts, — if persons conspire for any of these purposes, and it is proved that their intention was to assemble in numbers and armed; if their intention was to make what may be shortly termed insurrection, it must be considered a levying of war against the Queen within the meaning of the Act. The question, therefore, as to the first part of the indictment, namely, the criminal intention, is whether the prisoner had or had not the intention of making an insurrection against the Queen or the government.

[21] Though the applicable law in South Africa was Roman-Dutch, the Court of Appeal in *R v Erasmus* [1923] AD 73 (South Africa) approved and applied *Gallagher*. Kotze JA said at 89:

Whether any acts, laid to the charge of an accused person, amount to Treason will depend upon the circumstances of each case. The ordinary rule, that a man's intention or state of mind is to be judged of by reference to his acts and conduct, applies … The principle of our law in regard to Treason is not based on an antiquated notion, but is founded in reason and justice, and in its main feature is in accordance with the English Law, which depends largely upon statute. To levy war, for instance, against the Sovereign amounts to Treason, and this offence of levying war may be committed even by a few persons, who for instance devise or intend to force the King by means of acts of violence, to change his counsels, or to overawe the Houses of Parliament by violent measures directed against the property of the King, the public property, or the lives of His Majesty's subjects. (*R v Gallagher* (1883) 15 Cox CC 291).

[22] If the Accused had an intent to change the government or the Constitution by violent means, or to separate off one province to create a new Republic also by violent means, all such intents accompanied by overt acts would amount to a levying of war and be Treason: *R v Deasy* (1883) 15 Cox CC 334.

[23] To intend to remove a legitimate government and to supplant it with another may amount to levying war if backed up by a willingness to achieve those aims by the use of force: *R v Hardy* (1794) 24 State Tr 199.

[24] The monarch (or Head of State) need not be the object of hostility. If the cause is "public and general" and not a matter of private grievance, such conduct yet amounts to a levying of war: *Thistlewood* (above); *Damaree's case* (1709) Foster 213; 15 St Tr 521.

[25] In *R v Purchase* (1710) 15 State Tr 651 the Chief Justice said (at p 699):

And in all these cases the persons concerned therein, though they had no ill intention against the person of the king or queen, have been held guilty of levying war against the king or a queen. For these insurrections are of a public nature, and invasions of the royal authority. And this insurrection, with intent to pull down meeting-houses tolerated by law, intent of a more public nature and concern than many of those, and a higher violation of the public peace; and therefore is, in the eye of the law, rebellion, and levying war against her majesty.

[26] For this ruling I have drawn comfort from the judgment of Wilson J in his as yet unreported ruling in *State v Ratu Timoci Silatolu & Anor* Misc Action No HAM002/2002S, 26 March 2002 wherein a compendious analysis was made of the nature of Treason. The judgment collated the observations of judges and jurists down the ages on the matter.

[27] At 11 his Lordship concluded the first part of that ruling:

In the light of those authorities, it may be concluded that, if there was a conspiracy to overthrow the Government of England and if the conspirators, for that purpose and in furtherance thereof, did use unlawful force and other unlawful means, and, in particular, did a number of acts, including: the taking-over of the House of Commons

at Westminster and the unlawful detention of the British Prime Minister, various members of his Cabinet and various other Members of the House of Commons and others for the purpose of, and with intent to, overthrow the lawful Government of England; the seizure, taking and detaining of hostages; the formation of an illegal Government, the abrogation of the Constitution and other laws of England; and the purported appointment of a Head of State other than the Monarch, a Prime Minister and others under a rebel Government, then that would constitute Treason in England.

[28] I respectfully agree with that reasoning and conclusion. Such acts in Fiji would constitute Treason if committed in England.

Is Misprision of Treason obsolete?

[29] A similar argument has been put to the courts in the last 50 years. In *R v Aberg* [1948] 2 KB 173 at 176 Lord Goddard CJ for the Court of Criminal Appeal said of Misprision of felony that it was "an offence which is described in the books, but it is an offence which has been generally regarded nowadays as obsolete or fallen into desuetude".

[30] The full Court of the Supreme Court of Victoria in *R v Crimmins* [1959] VR 270 at 272 said:

In our opinion, however, the citizen's duty to disclose to the appropriate authorities any treason or felony, of which he has knowledge, remains the same and is still as binding upon him as it was in the early days of the common law. And no doubt cases will arise, from time to time, when the public interest will be best served by the citizen, who fails in this duty, being prosecuted for Misprision of felony. There is certainly no justification for the view that such a prosecution is no longer available to the Crown.

[32] In *Sykes v Director of Public Prosecutions* [1962] AC 528 (HL), the appellant's counsel conceded that Misprision of Treason, in contrast to Misprision of felony, was a statutory offence "and it has remained an offence to this day". "The existence of a public duty … arose in Misprision of Treason where the nature of the offence was of the utmost gravity" (at 536). Lord Denning said the duty was (at 555) "If anyone knew that another was guilty or in any way incriminated in Treason, he was bound at once to go to the King or to anyone in his immediate circle and tell him all that happened see Bracton, Book III, fol 118, 119. If he did not do so, he could be indicted either for Treason which carried the death penalty, or Misprision of Treason which did not".

[33] Lord Denning went on (at 558–9):

But great as is the authority of Lord Coke, greater still is the authority of the great Chief Justice Sir Matthew Hale on such a subject as this. Writing about the year 1670 he said in his Pleas of the Crown (1800 ed, vol 1, p 374): "By what hath been said touching Misprision of Treason we may easily collect what is the crime of Misprision of felony, namely, that it is the concealing of a felony which a man knows, but never consented to, for if he consented, he is either principal or accessory in the felony, and consequently guilty of Misprision of felony and more".

Now what Sir Matthew Hale there said has ever since been regarded as a correct statement of the law of England.

[34] On the issue of obsolescence, Lord Denning said (at 560):

In the light of this history it is plain that there is and always has been an offence of misprision of felony and that it is not obsolete. It is true that until recently it has been rarely invoked, but that is no ground for denying its existence.

[35] Misprision of felony is no longer an offence in Fiji. However, it appears in modified form in s 132 of the Penal Code as *compounding felonies* where the prosecution must establish that the Accused received some property or benefit for compounding or concealing a felony or for withholding evidence.

[36] On Misprision of felony, Lord Denning concluded (at 564):

> My Lords, it was said that this offence is out of date. I do not think so. The arm of the law would be too short if it was powerless to reach those who are "contact" men for thieves or assist them to gather in the fruits of their crime; or those who indulge in gang warfare and refuse to help in its suppression. There is no other offence of which such persons are guilty save that of misprision of felony.

These remarks could apply even more strongly to the graver offence of Misprision of Treason. For infrequency of usage of such an offence by the prosecuting authorities does not mean that efficacy or the protection of the public weal is not to be obtained from its continuance on the statute book.

Nor do I conclude that mere infrequency of prosecution, or in Fiji's case non-usage of the offence of Misprision of Treason, mean that the offence is no longer part of the existing law of Fiji.

Was Treason lost in constitutional and legislative amendments?

[37] Chapter VII of the Penal Code is headed "Treason and other offences against the Sovereign Authority". Treason protected the personal safety of the sovereign, and not that of her Governor or later Governor-General.

[38] Treason was the offence which outlawed the betrayal by her subjects or by those under her protection, within her realm, of the faith and allegiance which was due to the sovereign as the supreme head of state. Allegiance was due to Her Majesty as the Queen in right of Fiji, and as the apex of the body politic. Unlawful, unconstitutional, and violent challenges to Her government were equally acts of Treason. Such attacks, aimed at the overthrow of the lawful administration, were conceptualised as attacks upon the sovereign.

[39] By the deed of cession 1879 Fiji became a British colony, and Queen Victoria became the Queen of Fiji. The ceding of sovereignty was made to Queen Victoria and to Her heirs and successors. In 1970 the British Parliament passed the Fiji Independence Act. Shortly afterwards the Fiji Independence Order 1970 was promulgated by the Queen in council.

[40] Order 5 of that order provided as follows:

> *(1) The revocation of the existing Orders shall be without prejudice to the continued operation of any existing laws made, or having effect as if they had been made, under any of those Orders; and the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution* ***and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Fiji Independence Act 1970 and this Order.***
>
> *(2) Where any matter that falls to be prescribed or otherwise provided for under the Constitution by Parliament or by any other authority or person is prescribed or provided for by or under an existing law (including any amendment to any such law made under this section) or is otherwise prescribed or provided for immediately before the appointed day by or under the existing Orders that prescription or provision shall, as from that day, have effect (with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the* ***Fiji Independence Act 1970*** *and this Order) as if it had been made under the Constitution by Parliament or, as the case may require, by the other authority or person.*

> *(3) The Governor-General may, by order published in the Gazette any time before 10th April 1971 make such amendments to any existing law (other than the **Fiji Independence Act 1970** or this Order) as may appear to him to be necessary or expedient for bringing that law into conformity with the provisions of this Order or otherwise for giving effect or enabling effect to be given to those provisions.*
>
> *(4) An order made under this section may be amended or revoked by Parliament or, in relation to any existing law affected thereby, by any other authority having power to amend, repeal or revoke that existing law.*
>
> *(5) It is hereby declared for the avoidance of doubt, that, save as otherwise provided either expressly oar by necessary implication, nothing in this Order shall be construed as affecting the continued operation of any existing law.*
>
> *(6) The provisions of this section shall be without prejudice to any powers conferred by this Order or any other law upon any person or authority to make provision for any matter, including the amendment or repeal of any existing law.* [Emphasis added.]

[41] By the order of 8th October 1970, the word "Governor" in s 52(b) was substituted with "Governor-General". This order was made 2 days prior to the date of Fiji's independence, 10th October 1970. There was no subsequent amendment made either to s 50 [Treason] or to s 52 [Misprision of Treason].

[42] The Accused's counsel submits that s 50 of the Penal Code of 1945 cannot be modified, adapted, qualified or made an exception so as to conform with the 1970 Constitution. Further, he says that because Treason is defined by reference to the laws of England it does not have an independent existence under the laws of Fiji. What is required, he says, is the creation of a new offence of Treason against the Crown [so] in right of Fiji.

[43] Occasionally, a state incorporates a statute or a law from another state as part of its laws. This is unremarkable. Fiji had relied on the English Copyright Acts for many years, and the interpretation of the Penal Code itself is specifically made subject to the principles of legal interpretation obtaining in England [s 3].

[44] It is undoubtedly correct that in the interests of simplicity, clarity and precision, amendments to this area of the law could, and should, ideally have been undertaken. The fact that an overthrow of government in the early days of Independence could not have been contemplated is insufficient excuse for not having sought to avoid unnecessary complexity in this most significant branch of the law.

[45] Treason or its Misprision was never revoked as was the 1973 Order in *Surend Pal Nandan v PIB* (Fiji Court of Appeal Crim App No 19/1983 at 330, unreported). There never was an offence committed in that case since the 1976 Order did not contain a valid provision for notice to be given of a proposed rental increase, the very notice which it was alleged the Appellant had failed to give.

[46] I say complexity rather than ambiguity. The construing of these sections of the Penal Code post-independence do not present a difficulty when it is borne in mind what it is that ss 50 and 52 seek to protect. It is of course the body politic of the state. The head of the body politic remained the Queen, but her Majesty became the Queen as Queen of an independent Fiji. Any attempt to overthrow the government of Fiji by violent means would still constitute Treason. The need for the government to be protected from overthrow remained the same whether it were the Governor in Council or the Prime Minister and Cabinet.

[46] The saving provisions in relation to existing laws were re-enacted in identical terms in s 8(1) and (3) of the Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990. Republican status purportedly had been declared on 14 October 1987.

[47] In the Interpretation (Amendment) Decree 1989, the Interpretation Act Cap 7 was amended so that "Governor-General" was substituted relevantly with the word "President" and in the same vein, "State" was hereafter to mean the Republic of Fiji, and "Crown" to be replaced with "State".

[48] The Constitutions of 1990 and 1997 both made provision for the continuance of existing laws [ss 168 and 195(e) respectively].

[49] So far as the body politic of Fiji was concerned very little had changed, and there was no lessening of its need to be protected with these offences. Instead of the Queen at the apex of that body, there was the President. Though the President may not be personally protected by the offence of Treason as is the Queen in England, an attempt to depose him unlawfully, unconstitutionally and by violent means could still constitute an act of Treason.

[50] It is therefore possible to read into the Penal Code Sections without strain the effect of the 1970 Order and that of subsequent Constitutions so as to construe Treason and Misprision with the necessary modifications and adaptations.

The replacement of the Queen

[51] All of the three Constitutions that Fiji has lived with so far have protested their democratic essence. The 1970 Constitution moved Fiji from a Legislative Council to a full parliament under the Westminster system of government. The 1990 Constitution announced it was that of a sovereign democratic Republic, and in its preamble stated:

> AND WHEREAS they [the people of Fiji] reconfirm that Fiji is a democratic society in which all peoples may to the full extent of their capacity play some part in the institutions of the national life and thereby develop and maintain due deference and respect for each other and the rule of law.

[52] The 1997 Constitution states at s 1 that the Republic of the Fiji Islands is a sovereign democratic state. The Bill of Rights was only to be subject to restrictions or limitations if such were reasonable and justifiable in a free and democratic society. Few could doubt that Fiji's legal structure is that of a free and modern democracy.

[53] Since May 1987 when Fiji encountered its first extra-constitutional crisis, many Decrees have been promulgated. These vehicles of legislation are of dubious legality. The Governor General may have been able to rule directly without parliament for a limited time. He could act only as a matter of necessity in areas of need and in exercising residual prerogative powers. He could legislate to a limited degree, assuming executive authority of Fiji [see the analysis in Constitutional and Administrative Law in NZ by Professor Philip A Joseph, 2nd ed, 2001, pp 691–3].

[54] When the Republic was promulgated by Decree in October 1987, it is clear now that the promulgation could not be effective (or lawful) in achieving the abrogation of the 1970 Constitution, nor could it remove the Queen as Queen of Fiji. It was the act of one man, not of parliament.

[55] Perhaps because Fiji's inhabitants had never suffered a coup d'état before, it was generally assumed that one man alone, without going through any democratic process could remove a sovereign and tear up a Constitution. That was an incorrect assumption.

[56] No ratification of any of the decrees of this period was ever undertaken by placing them before the parliament, elected under the 1990 Constitution, neither has the 1990 Constitution itself been ratified. Parliament did not then sanction the removal of the monarch as Head of State.

[57] When debate was entertained prior to the passing of the Constitution (Amendment) Act 1997, it was again assumed that the constitutional changes following the 2nd coup of 1987 when republican status was promulgated, that the republic was already part of the lawful fabric of Fiji's constitutional structures. This assumption was also incorrect.

[58] With its history of hierarchical chiefly rule and its unusual link with the British Crown through the deed of cession, Fiji had to weigh carefully the appropriateness of removing its monarch in favour of a Presidency and a republic. This was an issue of importance demanding democratic debate through fulsome parliamentary processes. This never occurred. The Queen's removal was never debated in a bill before both Houses. In commenting on the New Zealand Constitution Professor Joseph said (at para 1.3.13, above): "but it would require extraordinary circumstances for Parliament to legislate against the independence of the judiciary or to sever the British monarchy".

[59] Her Majesty's removal was not achieved constitutionally or lawfully. The Queen's removal from Fiji's constitution therefore remains in doubt.

[60] I will not repeat the arguments and conclusions reached in several recent cases all of which pointed to the necessity for a searching and robust scrutiny of Decrees before they could be accepted as lawful by the courts. Reference can be made to some of those cases:

> *State v Audie Pickering* Suva High Court Misc Action No HAM007/2001, 30 July 2001(unreported); *Ghim Li Fashion (Fiji) Pte Ltd v Commissioner of Inland Revenue* Suva High Court Civil Action No HBC 0403/1998, 16 August 2001(unreported); *Jokapeci Koroi and 2 Ors v Commissioner of Inland Revenue and Anor* Lautoka High Court Civil Action No HBC179/2001 L, 24 August 2001(unreported).

[61] Fiji is not alone in having to deal with decrees. In *Chief Mliba Fakudze and 3 Ors v Minister for Home Affairs and 3 Ors* Swaziland High Court Case No 2823/2000, 5 February 2002 (unreported) (before Sapire CJ, Maphalala and Masuku JJ) said (at 4):

> *The King may legislate by decree. This power appears to be derived from the 1973 Proclamation and subsequent Decrees and proclamations. The extent of this power has never been tested. The use of this form of legislation could be justified if his advisors properly served the King, if the power were rarely use and then only in emergencies. Acts of Parliament are or should be the usual form of legislation. Parliament is the legislative body, and it should not be circumvented save in the most extraordinary circumstances.*

[62] The court concluded the decree was of doubtful validity. The process of its promulgation was challenged (at 5):

> *The decree as it stands is inchoate. We are perturbed that an incomplete document was placed unchecked before His Majesty. It reflects poorly on those (who) are charged with*

the duty of ensuring and certifying that documents placed before the King may properly be signed by him. In our view because of the lacuna the decree was of no force and effect.

[63] The decree was to apply (at 6):

> 2. *This Decree shall apply and operate pending the establishment or constitution of a new Parliament as constituted from the General Elections of 1998.*

The court commented (at 6):

> *Mr Maziya's argument was that as the Decree itself was a temporary measure, its operation terminated on the formation of a new parliament as constituted from the General Elections of 1998. This cannot be contradicted, having regard to the terms of Section 2 above quoted.*

The Swaziland High Court was not prepared to extend the life of the Decree being scrutinised. It is submitted the Proclamation of 1973 granting the King powers to make Decrees was equally without constitutional foundation and is unlikely to survive beyond an emergency, without ratification by the Parliament of Swaziland.

[64] A decree is necessarily a short-lived creature. It awaits parliament's proper process of ratification. Only parliament has the plenipotentiary powers of a lawful legislative body. Ratification is an unavoidable process as has been recognised in other jurisdictions. An early example was the ratification of the Uganda Constitutional Decree by the new parliament elected under it; *Uganda v Commissioner of Prisons, Ex parte Matovu* [1966] EA 514.

[65] Nether the Queen is still the Queen in right of Fiji or whether the parliament has been seen to have ratified republican status for Fiji, the body politic requiring protection from overthrow, remains almost the same. I find therefore that Treason and Misprision of Treason, continue, as envisaged, on the statute book of Fiji.

Common law Treason and Misprision

[66] Had I harboured any doubts as to the continuance of the statutory offences of Treason or Misprision of Treason, I should have found that they both continue to exist in Fiji as common law offences.

[67] Normally when a statute defines what was previously a common law offence, sets out its extent and provides for its penalties, it can be taken that the common law offence is thereafter subsumed in the statutory offence. However, offences exist which are of such gravity and importance that they remain by necessity offences whether or not provided for by statute. Among these are included, it may be argued, the offences of murder and rape. But the need for the protection of the structure of government at its highest levels, the parliament consisting of the President and the two Houses, as well as the Prime Minister and his Cabinet, is so central to the common weal of the people that armed risings to overthrow any part of that structure properly give rise to an offence generally considered the most serious crime in the land. Lord Cooke of Thorndon has said that some rights are so fundamental that they do not need to be stated by, or protected by, a Bill of Rights or a Constitution. Similarly, some crimes are so heinous and so dangerous to the State and to its inhabitants that they need not be recorded in a statute book. Such is Treason, and such are all the offences akin to it.

The elements of proof of Misprision

[68] The first element that the prosecution must prove is "that George Speight and others intended to commit Treason". The intention here concerns that limb of the offence of Treason of "levying of war". The significance of this phrase has already been traversed earlier in this ruling. The intention must involve not a mere rising for the purposes of a personal grievance but the unlawful overthrow of the established government by force, a public and general matter.

[69] The second element is that the Accused must be shown to have knowledge of the intention of others to commit Treason.

[70] Thirdly, it must be proved that the Accused omitted to give information of this intended Treason to the relevant authorities. This element is a negative averment, a matter to which I will return. It is not necessary to prove the Accused took active steps of concealment, merely that he omitted to carry out his obligation to notify the authorities of the Treason. "... It is his duty by law to disclose to proper authority of material facts known to him relative to the offence". *Sykes* (above at 563): *Crimmins* (above).

[71] The authorities to whom report is to be made can be one of the following, the president, the minister (which, for the Penal Code, is the Attorney-General), a magistrate, or a police officer.

[72] Fourthly, the giving of information must be done "with all reasonable despatch". Because Treason is so grave an offence, the giving of information concerning the Treasonous intention of the plotters must be given as a matter of great urgency. Information was given sufficiently swiftly of the Gunpowder Plot of 1605 so that the plotters were discovered under the Houses of Parliament in time to prevent the blowing up of the parliament by explosives. Whether information is given with all reasonable despatch is clearly a question of degree.

[73] The Accused maybe able to demonstrate on the prosecution's evidence or on his own, that he did indeed "use other reasonable endeavours to prevent the commission of the offence", that is, the Treason which he knew was intended.

The two-witness rule

[74] Section 54 of the Penal Code provides:

> *Limitations as to trial for Treason, Misprision of Treason, or Treasonable felonies*
>
> *A person cannot be tried for Treason, or for any of the felonies defined in sections, 51, 52 or 53, unless the prosecution is commenced within two years after the offence is committed.*
>
> *Two witnesses necessary*
>
> *Nor can a person charged with Treason, or with any of such felonies, be convicted, except on his own plea of guilty, or on the evidence in open court of two witnesses at the least to one overt act of the kind of Treason or felony alleged, or the evidence of one witness to one overt act, and one other witness to another overt act of the same kind of Treason or felony.*
>
> *This section does not apply to cases in which the overt act of Treason alleged is the killing of Her Majesty, or a direct attempt to endanger the life or injure the person of Her Majesty.*

[75] The purpose of the rule appears to have been to provide a safeguard for the accused and to ensure a proper adequacy of evidence for such a grave charge. Subornation of witnesses to give false testimony was so manifest in the 16th century that this rule would have afforded the Government's enemies, or mere dissenters, little protection.

[76] The special rules exist for Misprision since it is an offence akin to Treason. It is the Treasonable intent element therefore that must receive the support of the two witnesses. The omission to give information cannot be corroborated. Prosecuting counsel correctly submits that the rule could be satisfied by the testimony of one witness as to the plotters Treasonable intent supported by the evidence of the Accused's similar account given in Police interview of what the plotters said at the meeting immediately prior to the coup. *Rex v Mayhew* (1834) 6 Carrington & Payne 315; *R v Threlfall* (1914) 10 Cr App R 112 at 116–7; *R v Sumner* [1935] VLR 197.

Negative averments

[77] If the Accused had provided the information concerning the Treason to the relevant authorities, he would not now be facing this charge. This of course is the prosecution allegation. I do not understand the Accused's case to turn on whether or not he did make report. If he had have made a report, he would have had an excuse, completely exculpating him from blame and from liability to prosecution.

[78] Section 144 of our Criminal Procedure Code deals with negative averments in this way:

> *Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the Act creating such offence, and whether or not specified or negative in the charge or complaint, may be proved by the defendant or accused, but no proof in relation thereto shall be required on the part of the complainant or prosecution.*

[79] Section 122(b)(ii) also has some relevance:

> *It shall not be necessary, in any count charging an offence constituted by an enactment, to negative any exception or exemption from, or proviso or qualification to, the operation of the enactment creating the offence.*

[80] Whether it is to be founded on the information for the excuse being peculiarly within the knowledge of the Accused, *R v Turner* (1816) 5 M & S 206, or whether as a matter of pleading and ease of proof of an issue in a trial, it seems that it is more appropriate and practical that the burden of proof for the excuse be placed (as an exception to the normal burden) upon the Accused. *Woolmington v Director of Public Prosecutions* [1935] AC 462; *R v Hunt* [1987] AC 352; *Rohit Ram Lochan v State* (Court of Appeal, Fiji, Crim App No AAU0015/1996S, 28 November 1997, unreported).

[81] In *Rex v Oliver* [1944] 1 KB 68 at 75 Viscount Caldecote CJ giving the judgment of the court said:

> *In the circumstances of the present case we are of opinion that the prosecution was under no necessity of giving prima facie evidence of the non-existence of a licence.*

This case was cited with approval in *Rajgopal Pillai v Reginam* [1962] 8 FLR 163 at 167E.

[82] The same pertains in the case at issue here. The prosecution do not have to call some evidence, prima facie evidence, from the President and the Attorney-General to say no report was made to them by the Accused, or similarly by some Magistrates or the Commissioner of Police. This aspect of the case is to be proved by the Accused and there will be "no hardship on him in being put to the proof" Swift J in *R v Scott* (1921) 86 JP 69. All other elements remain to be proved by the prosecution.

Those are the elements.
The trial may now continue.

Motion dismissed.