ROBERT WALES FERATALIA (as representative of the Peoples' Power Action Group) **~V~ ATTORNEY GENERAL** (as representative of the Deputy Commissioner of Police (Operations) and the Police Commander, Honiara City)

High Court of Solomon Islands
(Muria, CJ)

Civil Case No. 202 of 2002

Date of Hearing: 11th September 2002
Date of Judgment: 2nd October 2002

Mr D. Hou for the Applicant
Mr J Deve for the Respondent

MURIA CJ: The applicant having been granted leave, now comes to this Court seeking a number of orders, namely:

1. A declaration whether upon the true construction of the following provisions –

   (a) Section 12 (1) of the Constitution and in particular the "freedom to communicate ideas and information without interference;"
   (b) Section 13 (1) of the Constitution and in particular the "enjoyment of his freedom of assembly .....and his right to assemble freely and associate with others;"
   (c) Rule 3 of the Processions and Public Assemblies Rules and Act (Cap. 29) of the revised laws;

   renders the refusal to grant permission by the Respondent to the Applicants to convene a procession at Point Cruz opposite the Westpac Bank to the Prime Minister's Office for the purpose of presenting a Petition to the Hon. Prime Minister inconsistent and contravenes the said provisions and therefore null and void ab-initio.

2. A declaration whether upon the true construction of Rule 3 of the Processions and Public Assemblies Rules and the Act (Cap. 29) of the revised laws, it is mandatory and imperative on the Respondent to grant

permission in the event that the requirements with the said rule are followed by the Applicant.

3. A further Declaration that the question of the current law and order problem as justifying the refusal to grant permission by the Respondent is an irrelevant consideration in the exercise of the discretion in Rule 3 of the Procession and Public Assemblies Act (Cap.29) of the revised laws.

Consequential upon the grant of the above declarations, the applicant seeks an order of certiorari to quash the decision of the respondent and an order of mandamus commanding the respondent to grant permission for the purpose of convening the said proposed procession. To assist in determining the issues arising in this case, it is necessary that I set out briefly the facts of the case.

Brief Facts

The applicant is the spokesman for the group calling itself the People's Power Action Group (herein referred to as *"the PPAG"*) whose members have been unhappy with the way the government has been doing certain things and wish to stage a protest march against the government. By a letter dated 1st August 2002, the applicant wrote to the Police Commander for the Honiara City seeking permission to hold a meeting at the Melanesian Cultural Village the next day, 2nd August 2002 and subsequently to stage a protest march on 5th August 2002 from Point Cruz to the Prime Minister's Office where a protest note was to be handed to the Prime Minister, Sir Allan Kemakeza. A reply from the Honiara City Police Commander was given on 2nd August 2002 disapproving the application, citing the *"fragile situation of our country's position of law and order"* as the reason for refusing the application. The Police Commander also pointed out to the applicant of the requirement of a 14 days notice of an intention to present petitions under 'section 2 (3) (b) of the Processions and Public Assemblies Act' (Cap. 29) ("the Act"). The citation of the section is incorrect as there is no such provision in the

mentioned Act. The Police Commander was clearly referring to section 2 of the Act and Rule 3 (b) of the Processions and Public Assemblies Rules ("the Rules").[1]

On 5th August 2002 the applicant again wrote to the Police Commander giving 48 hours notice to hold a public demonstration, that is, on 7th August 2002 afternoon. The applicant also gave a 14 days notice, should the 48 hours notice were not permitted under law. By an undated letter, the Deputy Commissioner of Police (Operations) refused the request for protest march *"having considered the fragile state of the law and order process, and the necessity for the preservation of peace and order."* Consequently the applicant has issued these proceedings against the respondents.

Application for Constitutional redress

Before I deal with the merit of this applicant's case, I feel I should mention something about the procedure for seeking constitutional redress from the Court in this jurisdiction. There are two ways by which an applicant who alleges contravention of a constitutional provision may apply to the Court for redress. These two provisions are sections 18 (1) [2] and 83 (1)[3] of the Constitution. The former provides for separate enforcement proceedings for breaches of fundamental rights and freedoms of the individual as protected under Chapter II of the Constitution while the latter provides for proceedings where legal remedy is sought for alleged breaches of the provisions of the Constitution (other than Chapter II) as in the case of *Kenilorea –v- Attorney General.* [4] Leave is required under O. 61A[5] of *the High Court (Civil Procedure) Rules 1964* for proceedings under section 18 of the Constitution to be brought as done in *Jamakana v Attorney-General and Another*; [6] and also in *Tong –v- Attorney General.*[7] Mr Hou recognised the need for leave in this case since part of his client's claim is for breach of his client's

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[1] Rule 3 is set out at p 8, post
[2] Section 18 (1) is set out at p 4, post
[3] Section 83 (1) is set out at p 5, post
[4] Kenilorea v Attorney General [1983] SILR 61
[5] O.61A provides for the procedure for the Enforcement of Protective Provisions of the Constitution
[6] *Jamakana v Attorney General and Another* [1983] SILR 127
[7] *Tong v Attorney General* [1985-1986] SILR 112

fundamental rights and freedoms under sections 12 (1)[8] and 13 (1)[9] of the Constitution. There is, however, a salient feature of the constitutional redress process which ought to be borne in mind and one which the applicant in the present case has to bring himself within it before he can invoke the power of the Court in a constitutional case such as the one he now brings. That salient feature is contained in section 18 (1) of the Constitution which states:

> "(1) Subject to the provisions of subsection (6) of this section, if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened *in relation to him* (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress." (Emphasis added)

This case is brought pursuant to section 18 of the Constitution and the salient element in these proceedings, as can be seen, is borne out by the requirement of the law that the alleged contraventions of the applicant's rights must be *"in relation to him"*. As such a representative action as in the present case would clearly be outside the process envisaged under section 18 of the Constitution. Thus the only way the applicant can maintain this action pursuant to section 18 would be for him to bring this case for breaches of his rights and freedoms *in relation to him.* I respectfully share the view taken by His Lordship, Mr. Justice Palmer in *Hon. Bartholomew Ulufa'alu –v- Attorney General and Others* [10] where His Lordship said:

> The rights that an applicant can seek redress for under section 18(1) are not the rights of a friend, supporter or family member. An applicant cannot be permitted to come to court for redress, for contraventions, which relate to others.

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[8] Section 12 (1) is set out at p 13
[9] Section 13 (1) is set out at p 13-14
[10] *Hon Bartholomew Ulufa'alu v Attorney General* (9 November 2001) High Court, Civil Case No 195/2000

Should the applicant pursue the course of action provided under section 83 (1) of the Constitution? I think in the present case it would not be possible for him to follow that route either, since the alleged breaches here complained of were for the contraventions of provisions found in Chapter II of the Constitution, and section 83 (1) clearly grants jurisdiction for contraventions of provisions of the Constitution, other than Chapter II as shown by the language of that provision:

> "(1) Subject to the provisions of section 31 (3) and 98 (1) of, and paragraph 10 of Schedule 2 to, this Constitution, if any person alleges that any provision of this Constitution (other than Chapter II) has been contravened and that his interests are being or likely to be affected by such contravention, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for a declaration and for relief under this section.

The only possible route for the applicant to pursue this case would be on the basis of alleged breaches of *his* constitutional rights and freedoms *in relation to him*, and not as a representative action on behalf of the PPAG. I am very mindful of the fact that this is a case involving alleged breaches of fundamental rights and so allowance, within the constitutional limits, must be given to a liberal approach to the rules of practice and procedure so as to give individuals a full measure of their guaranteed fundamental rights and freedoms. That being so, as the applicant is personally involved also in the proposed protest march and so his individual rights and freedoms are affected in relation to himself, the Court is prepared to deal with the matter on that basis. However in the future, those who contemplate bringing constitutional actions before the Court must be aware of the course of actions set out in two provisions mentioned. Parties are also urged to take note that proceedings under the two constitutional provisions are commenced by different processes - an Originating Summons is normally used for application under section 83 while application under section 18 is usually commenced by notice of motion. The provisions of O.61A of the *High Court (Civil Procedure) Rules 1964* are very clear and legal practitioners representing parties in these kinds of proceedings ought to take heed of these matters.

The Applicant's Case

The case for the applicant is that the refusal by the Honiara Police Commander and Deputy Commissioner of Police (Operation) to grant permission to the members of the PPAG to stage a protest march against the government was a breach of the applicant's rights and freedom as guaranteed under sections 12 and 13 of the Constitution. However at the hearing of this case, the applicant confined himself to challenging the refusal to grant permission by the Deputy Commissioner of Police (Operations) as contained in the undated letter addressed to the PPAG (herein referred to as *'RF4'*). I set out below the said letter as it would be helpful:

TO: Peoples Power Action Group **REF:** DCP/OPS/B/20
Attention: Robert Wales Feratalia

SUBJECT: RE REQUEST TO HOLD PUBLIC MEETING/PROTEST MARCH

I made further reference to your request regarding above issue to Police Commander Honiara City, to stage a Protest March at 09:30 am on August 7th 2002.

In terms of the Provisions of Section 3 and 4 of the Procession and Public Assemblies ACT Cap 29, having considered the fragile state of the Law and Order process, and the necessity for the preservation of peace and order, it is not appropriate to hold such meeting or conduct such Protest March.

By virtue of the Provisions stipulated your request is hereby refused.

WILFRED AKAO
Deputy Commissioner of Police
OPERATIONS

The provisions referred to by the Deputy Commissioner are clearly references to rules 3 and 4 of the Processions and Public assemblies Rules, and not of the Act. It was contended for the applicant that as regard the letter of refusal dated 2nd August 2002 from the Honiara City Police Commander, it was properly issued unlike that of "*RF4*" which the applicant alleged to have been issued contrary to the Act, Rules and the Constitution.

The Respondent's Case

The respondent's case is that the Processions and Public Assemblies Act and Rules give sole discretion to the relevant authority to grant or refuse permission to hold a protest march. In this case, it was contended for the respondents that in the exercise of that discretionary power, the police authority was right in refusing to grant permission for the protest march. That refusal was said to have been justified on the basis that there was a high potential for a breach of the peace should the protest march were allowed to be held, that the security situation in Solomon Islands, especially in Honiara, was still volatile and that there was inadequate manpower in the police to deal with any violent eventuality.

With regard to the constitutional argument, counsel for the respondents submitted that the rights and freedoms provided under sections 12 (1) and 13 (1) of the Constitution are subject to the limitations respectively set out in subsection (2) of each of those provisions. Thus the exercise of the rights and freedoms under sections 12 (1) and 13 (1) of the Constitution must take into consideration lawful restrictions such as those found, respectively, in the provisions[11] of sections 63 and 73 of the Penal Code. These Penal Code provisions, argued Counsel, must be read together with the relevant sections of the Constitution.

[11] Sections 63 and 73 of the Penal Code deal, respectively, with spreading false rumours, etc, and unlawful assembly

The Issues

Various issues have arisen in this case but the main issues raised by the arguments presented are: -

1. Whether the refusal to grant permission was ultra vires the Act and Rules.

2. Whether the refusal was an unlawful encroachment on the constitutional rights of the applicant as set out under sections 12 and 13 of the Constitution.

3. Whether the consequential orders of certiorari and mandamus ought to be issued.

As mentioned, there are other issues which arose during arguments, but they will be dealt with in the course of dealing with the issues outlined above.

Whether refusal to grant permission ultra vires the Act and Rules

The power to grant or refuse permission to hold protest march is contained in the Processions and Public Assemblies Act (Cap. 29) and the Rules. Section 2 of the Act simply empowers the Minister responsible to make rules governing processions and public assemblies and the relevant provision with which we are more concerned here is rule 3 which provides: -

> "3. On an application for permission to collect, convene, form or hold such procession or public assembly being made to a Provincial Secretary or in the absence of such Officer, to a Police Officer not below the rank of Inspector he may grant or refuse such permission:
>
> Provided that no such permission shall be granted in respect of any procession or public assembly unless -
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> (a) the application is made not less than forty eight hours before it is desired to hold such procession or public assembly, and is made by

representatives resident in the locality in which it is proposed to hold such procession or public assembly of the religion or organization to which such procession or public assembly pertains; and

(b) written notice of the intention to collect, convene or form the procession or public assembly has been given by the applicant to the appropriate Government Ministry fourteen days prior to the date of the application and stating in writing the intention to presenting any petition or making any speech or both, as the case may be, to that Government Ministry as the object of such procession or public assembly."

Counsel for the applicant argued that the above provisions should be construed so as to make it mandatory for the responsible authority to grant permission to the applicant to hold a protest march as long as sub paragraphs (a) and (b) of rule 3 have been complied with. It was further contended that no discretion comes into play at that stage. With respect I do not feel that such a construction ought to be given to the provisions of rule 3. To do so would be to disregard the discretion clearly conferred by the Rules upon the responsible authorities who have been charged to exercise such power having regard to the policy and purpose of the law in question. The policy behind such a law is that a person is free to collect, convene, form or hold processions or public assemblies provided that it is not against the law. This is the basic common law position. However the Act and Rules, in giving statutory recognition to the common law powers regulating conduct of processions and assemblies, provide for circumstances that are necessary to be taken into account in order to properly regulate the exercise of the powers under the Act and Rules. This was recognised by Windeyer J in *Finance Facilities Pty Ltd –v- Federal Commissioner of Taxation* [12] where he said that *"the discretion must be exercised bona fide, having regard to the policy and purpose of the Statute conferring the authority and the duties of the officer to whom it was given....."*. The language of Rule 3 in this case is clear and unambiguous. It confers discretion on the Provincial Secretary or the police to grant or refuse permission to hold a protest march.

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[12] *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 at 134

"May" – Discretionary or Mandatory?

Counsel cited a number of authorities to support his argument that in the present case, the word *"may"* as used in rule 3, must be construed as mandatory. I agree that there are cases in which the word *"may"* had been interpreted as mandatory or imperative. In such cases, however, regards are usually paid to the purpose of the legislation, the nature of the power and the context in which the word is used: see *Cole v Esanda Ltd* ;[13] see also *Oxford University v Registrar of Trade Marks* .[14] But as Lord Parker CJ in *Re Shuter* [15] pointed out that this should be done so *"in the absence of sufficient cause being shown to the contrary,"* the onus being upon the person alleging mandatory use of the word "may:" *Re Dunsborough Districts Country Club Inc.* [16] Again it had also been reiterated that while the subject matter and context of a legal provision may support an interpretation of such provision as mandatory, other considerations which may "positively suggest that a discretionary power was really intended" must be taken into account as well: *Ward v Williams.*[17] In the case of *Cooper v Metropolitan Taxi Cab Board,*[18] Prior J pointed out that the word "may" should primarily be construed as discretionary. It is also worth noting the remarks by Cotton, LJ in the case of *In re Baker, Nichols v Baker* [19]:

> I think that a great misconception is caused by saying that in some cases "may" means "must." It never can mean "must," so long as the English language retains its meaning; but it gives a power, and then it may be a question in what cases, where a judge has a power given him by the word "may," it becomes his duty to exercise it.

Apart from rule 3 already set out above, rule 2 provides, "No procession or public assembly *may* be … held … without permission" (emphasis added) and rule 4 says, "Permission … *may* be granted subject to any one or more … conditions" (emphasis

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[13] Cole v Esanda Ltd [1982] Tas R 130
[14] Oxford University v Registrar of Trade Marks (1990) 24 FCR 1
[15] Re Shuter [1960] 1QB 142 at 147
[16] *Re Dunsborough Districts Country Club Inc*, [1982] WAR 321 at 329 (WA SC).
[17] *Ward v Williams* (1954-1955) 92 CLR 496 at 506-507
[18] *Cooper v Metropolitan Taxi Cab Board* [1993] ACL Rep 425 SA 11
[19] *In re Baker, Nichols v Baker* (1890) 44 Ch D 262 at 270

added). When one consider the provisions of rules 2, 3 and 4 of the Rules, the language there used positively suggests that it is permissive, in that it allows a procession or public assembly "*may*" be held but that it can only be done so with permission; that the said permission *may be granted* on application, and upon conditions. There are, therefore, obvious indications in this case to justify the construction of *"may"* being discretionary.

Counsel for the applicant somewhat noted reluctantly that rule 3 envisages the exercise of a discretionary power. However counsel suggested that in the exercise of the discretion under this rule, the question of preservation of peace and order is irrelevant to the issue of the permit, that is, it only becomes relevant after the permission was granted by attaching conditions to the permit. To follow counsel's argument, rule 4 (g) which is in the following terms:

> "4. Permission under the last preceding rule may be granted subject to any one or more of the following conditions –
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> (g) that a Provincial Secretary or police officer not below the rank of Inspector may, if he considers it necessary for the preservation of peace and order, at any time cancel or amend a permit issued under these Rules"

and which makes the "preservation of peace and order" as one of the conditions for the issue of permit, has been said to have no relevance to the exercise of the power as to whether or not permission to hold public demonstration should be granted. It has further been suggested that the concern for the "preservation of peace and order" becomes only relevant for the purpose of imposing conditions on the permit. With respect, such an argument is stretching the language of that provision too far. The language of rule 4 is plain in that it clearly says that the permission under rule 3 *"may be granted subject to"* the conditions set out in rule 4. One of those conditions is *"the preservation of peace and order,"* in paragraph (g) which empowers the Provincial Secretary or police *"at any time"* to cancel or amend the permit. He does not have to wait until something happens before canceling the permit. He may do so immediately or later if he

considers it necessary in the interest of preserving peace and order. For this is part of the preventative power, and so the preventative duty, of the police in cases where there are reasonable grounds of apprehension that a breach of the peace is imminent or likely to be committed, to take action to prevent commission of the breach of the peace. Lord Hewart CJ put in thus in *Thomas –v- Sawkins* [20]:

> "A police officer has *ex virtute officii* full right to so act when he has reasonable ground for believing that an offence is imminent or is likely to be committed".

In the exercising such preventative powers and duty, the police will have to take into account necessary factors, including conditions necessarily to be taken into account. The conditions set out in rule 4 are an inseparable part of the process of issuing permit to a hold protest march and as such they are relevant to the exercise of the discretion as to whether permission should be granted or not. Thus the right to assemble, to hold procession and to demonstrate exists in Solomon Islands and it is preserved under the Act. As we shall see later in this judgment, it is also entrenched in the Constitution. The exercise of the right, however is, as Lord Denning said in *Hubbard –v- Pitt* [21]: *"subject only to limits required by the need for good order and the passage of traffic"* thereby stressing the *"need for peace and good order"* and respecting the rights of others also. These considerations necessarily entail that the authority responsible must apply his mind objectively as to whether the protest march is likely to cause a breach of the peace or not. Having done so, the authority *"may"* then grant or refuse the permit, an exercise of a discretionary and not a mandatory power.

Thus on the true constructions of the Act and the Rules, and in particular, rule 3, the grant of permission to hold procession or public assembly is discretionary.

Whether the refusal to grant permission contravenes sections 12 and 13 of the Constitution.

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[20] *Thomas v Sawkins* [1935] 2 KB 249 at 255
[21] Hubbard v Pitt [1975] 3 All ER 1 at 11

I now turn to the Constitutional argument that the decision by the respondent refusing to grant permission to hold protest march contravenes the Constitution. The basic argument for the applicant is that the refusal to grant permission was an impermissible restriction on the applicant's fundamental rights protected under sections 12 and 13 of the Constitution which provide: -

"12. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purpose of this section the said freedom includes the freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention or this section to the extent that the law in question makes provision -

(a) in the interests of defence, public safety, public order, public morality or public health;

(b) for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating the administration or the technical operation of telephony, telegraphy, posts, wireless, broadcasting or television; or

(c) that imposes restrictions upon public officers,

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

13. (1). Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or to form or belong to trade unions or other associations for the protection of his interests.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -

(a) in the interests of defence, public safety, public order, public morality of public health;
(b) for the purpose of protecting the rights or freedoms of other persons; or
(c) that imposes restrictions upon public officers,

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

The argument by Counsel for the applicant is that the provisions referred to must be interpreted in order to advance rather than impede the rights and freedoms mentioned. I agree with that proposition which had been affirmed in this jurisdiction in *Hunuehu –v- Attorney General* [22] and *Prime Minister –v- The Governor General.*[23] In this respect, Counsel further argued that the restrictions allowed under subsections (2) of both sections 12 and 13 of the Constitution must be interpreted to avoid violation of the applicant's rights to freedom of expression and freedom of assembly and association. Counsel, however, conceded that the Processions and Public Assemblies Act (Cap. 29) is a law made in the interest of public safety and public order as stipulated under subsections (2) of sections 12 and 13 of the Constitution, and that the restrictions are reasonable and that they are reasonably justifiable in a democratic society. However, Counsel urged that the restrictions must be found only within the boundaries of the Act if they were to conform to the Constitution. Thus Counsel's argument is that while the Act is such a law allowed under sections 12 (2) and 13 (2) of the Constitution, the action of the respondent in restricting the applicant's rights must only be found within the Act. If the restrictions were imposed outside the terms of the Act, the restriction would be unconstitutional and therefore null and void. With this contention, it is now necessary to consider the extent of the constitutional provisions referred to. That the Processions and Public Assemblies Act (Cap. 29) is a law that authorizes limitations on the rights to freedom of assembly and association is beyond question. The only question is whether

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[22] *Hunuehu v Attorney General* (24 April 1997) Court of Appeal, Civil Appeal No. 5/1996
[23] *Prime Minister v Governor General* (10 September 1998) High Court, Civil Case No. 150/1998, also reported in [2001] 1

the action of the respondent in refusing permission contravenes sections 12 and 13 of the Constitution.

The right to freedom of expression and freedom of assembly and association are closely linked with each other. It enables citizens to peaceably meet and consult one another about public affairs of the nation and workings of the government and if necessary to petition for redress of their grievances: *United States –v- Cruikshank.*[24] In Solomon Islands the Constitution recognises the importance of those rights and places them alongside each other. But the rights are not absolute, for the Constitution provides limitations to the exercise of the rights. Hence the position in the US as expressed in the First Amendment to US Constitution where it provides: -

> Congress shall make no law.....abridging .....the right of the people peaceably to assemble and to petition the Government for a redress of grievances

differs to the position under our Constitution which allows laws to be made imposing reasonable limitations to the rights As a basic principle of Constitutional law, any restriction upon a fundamental right must be based on law. In other words, it must be *"contained in or done under the authority of any law"* as stipulated in sections 12 (2) and 13 (2) of the Constitution.

The Action by the Police

The question implicit in this case is: - Was the action by the police *"contained in or done under the authority of any law"*, namely the Processions and Public Association Act and Rules? If the action was taken within the provisions of the Act and Rules then, as Counsel for the applicant conceded, it would not be *ultra vires* the Constitution. Firstly, was it within the power under the Act and Rules, to refuse permission to hold protest march? I think the answer to that must be an undoubted *'yes'*. The authority granted by

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L R C 425.

subsection (2) of section 13 necessarily includes enacting laws which, for good reason, allow restrictions on a person's freedom of assembly and association. It would be absurd to think that the Processions and Public Assemblies Act and Rules would simply remain a toothless mace in the light of a provision such as subsection (2) of section 13 of the Constitution.

Was there any basis in law for the respondent's action in refusing the applicant's request for protest march? The letters written by the Deputy Commissioner of Police and the Police Commander for Honiara City, as well as the affidavits filed by the two senior police officers showed that the proposed protest march had *"a high potential for breach of peace and public order according to police intelligence"* and that the security situation in Solomon Islands was still *"volatile especially in Honiara."* For those reasons together with other concerns raised in the affidavits, the Deputy Commissioner of Police (Operations) refused to grant permission to the applicant and his group to hold a protest march. The respondent, not only refused permission, but also gave reasons for so deciding. In *ANM Ousainu Darboe and Anov –v- Inspector General of Police and Anov,*[25] a case in The Gambia, the High Court of the Gambia held that a reason for refusal to grant permit to hold political meetings must be given if it was to comply with the constitutional provisions. The respondent in the present case had given reasons for his refusal to grant permission to the applicant to hold a protest march. Thus the respondent for reasons of public order and peace refused to grant permission to the applicant according to law.

Whether Police action reasonably justifiable in a democratic society

Numerous authorities have now established that any restriction on the fundamental rights must not only be allowed by law but must be reasonably justifiable in a free and democratic society. In the Papua New Guinea case of the *Supreme Court*

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[24] *United States v Cruickshank* (1876) 92 US 542

[25] *ANM Ousainu Darboe and Anov –v- Inspector General of Police and Anov* (199) 2 CHRLD 166

Reference No. 2 of 1982; Re Organic Law [26] Kapi J adopted a passage in *The State of Madras –v- V. G. Row* [27] where Patanjali Sastri CJ said:

> "It is important in this context to bear in mind the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned and no abstract standard, or general pattern, or reasonableness, can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable in all circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decisions should play an important part, and the limit to their interference to the legislative judgment in such cases can only be dictated by their sense of responsibility and self restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have in authorizing the imposition of the restrictions considered them to be reasonable."

The above observations by Patanjali Sastri CJ was also adopted in this jurisdiction in *Tri-Ed Assosication –v- Solomon Islands College of Higher Education.*[28] The test is one of reasonableness, which cannot simply be viewed as an abstract standard since fundamental rights exist in a real world with real people and with practical life-situations. In other words the principles of democracy based on freedom and equality must be applied to particular circumstances on a case by case basis. This reasoning had been fortified by the Court in South Africa in *State –v- Makwanyane and Anov* [29] where Chaskalson P. said:

> "Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionally, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."

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[26] *Supreme Court Reference No. 2 of 1982* [1982] PNGLR 214 at 235
[27] *The State of Madras –v- V. G. Row* A.I.R. (1952) S.C. 196 at 200
[28] *Tri-Ed Association v Solomon Islands College of Higher Education* [1985-1986] SILR 173 at 186-187
[29] *State v Makwanyane and Anor* (1995) 6 BCLR 665 para 104

What must clearly be borne in mind is that in this balancing process, it is important to ensure firstly, the restriction is sanctioned by law; secondly, the purpose for which the right is to be limited and the importance of the purpose to the community concerned exist; thirdly, there is a compelling social need for the restriction; and fourthly, it is reasonably justifiable in a democratic society. The Courts in this country and in the prevailing conditions at this time play an important role as an instrument, not only of justice but also of peace and stability, in our democratic society. In this role therefore, the Courts must ensure that fundamental rights as guaranteed by the Constitution are guarded and if they were to be restricted, it must be done under the authority of the law and with measures reasonably justifiable in the given situation. The High Court of Uganda in *Uganda –v- Commissioner of Prisons; Ex parte Matobu* [30] could not have been more helpful when it said:

> Such measures must be reasonably justifiable for the purposes of dealing with the situation which exists at any particular time and therefore whatever measures are adopted must depend upon how grave the situation is at any given time.

I must bear in mind, of course, that any restriction on the rights of the individuals in this country must be rationally connected to the legitimate objective such as security, public order and peace. I am equally mindful of the advice contained in the judgment in the Malawi case of *National Consultative Council –v- Attorney General* [31] where it was said:

> There is a need to strike a balance between the needs of the society as a whole and those of the individual. If the needs of the society in terms of peace, law and order, and national security are stressed at the expense of the rights and freedoms of the individual, then the Bill of Rights contained in our Constitution will be meaningless and the people of this country will have struggle for freedom and democracy in vain. In a democratic society the police… must be able to perform their main function of preserving peace, law and order without violating the rights and freedoms of the individual… Matters of national security should not be used as an excuse for frustrating the will of the people expressed in their constitution.

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[30] *Uganda –v- Commissioner of Prisons; Ex parte Matobu* (1966) E.A.L.R. 514 at 543

[31] *National Consultative Council –v- Attorney General* (23rd May 1994) High Court of Malawi, Civil Case No. 958/1994

But each case depends on its own circumstances. The above Malawi case was more concerned with the right to free speech, and the prevailing circumstances in Malawi at the time could be a lot different to the situation here in Solomon Islands. In our situation here in this country, it would be a denial of reality to say that the anticipated threat of violence noted by the police was a mere conjecture or far fetched. In fact one may well equate it with *"a spark in a powder keg"* as put by Jagainatha Shetty J in *Rangarajan –v- Jagjivan Ram & Ors.*[32]

In his reasons for refusing the applicant permission to hold protest march in the present case, the Deputy Commissioner of Police (Operations) reiterated what can only be described as the obvious and prevailing circumstances of lawlessness and violence in this country, more so in Honiara, at this present time. The possibility of a breach of the peace in such situation can rightly be described as *'real'*. As such not only were the rights of the vocal group but also the rights of the silent majority who might have been affected by the protest march had to be taken into account as well. This entailed a balancing of the different interests, and that having been so done, the Deputy Commissioner of Police (Operations) declined to grant permission. In such circumstances, this Court can only conclude that the refusal to grant permission, while constituting a restriction on the right to freedom of assembly, was reasonable and justifiable in a democratic society, a limitation lawfully permitted under the Constitution.

Where does this leave the applicant's case at? The applicant has not disputed that the Processions and Public Assemblies Act and Rules are the laws to which subsection 2 of s.13 of the Constitution applies in the interests of public safety and public order, nor has he denied that the power under the Act and Rules authorises the relevant authorities to grant or refuse permits to hold public protests. Thus the only live issue must be whether the exercise by the respondent of the said power constitutes a violation of the Constitutional rights of the applicant. To succeed in this argument, the applicant must

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[32] *Rangarajan –v- Jagjivan Ram & Ors* [1990] LRC (Const.) 412 at 427

demonstrate that exercise of the power under the Act and Rules by the respondent went outside the ambit or exception allowed under sections 12 (2) and 13 (2) of the Constitution. The evidence on the part of the applicant upon whom the onus lies, falls well short of establishing such a conclusion.

Conclusion

The circumstances in which a case is to be decided differ from one case to another. In the present case, the circumstances at the time the decision was made, refusing permission to hold a protest march were such that they justified the respondent's action and cannot be lightly condemned as a means to stifle political scrutiny. Of course, generally speaking, in a free and democratic society, political and public figures must be more open to public scrutiny and criticism to ensure that they are accountable to the people whom they serve. But the test of democracy has never been a closed option, rather it must set itself against the practical realities of society where restrictions on democratic principles are acceptable and justifiable in a free and democratic society such as Solomon Islands. In the case now before the court, I am satisfied that in the circumstances, the action taken by the respondent was one that was contained in or done under the authority of the law and that it was reasonably justifiable in a democratic society. There is no evidence to suggest otherwise, at least in the present situation of this country. Thus the application by the applicant cannot succeed and it is refused.

The circumstances also justify that each party to bear its own costs.

Sir John Muria

CHIEF JUSTICE