IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No.24 of 1981

Between:

ALIPATE VOKAI & 21 OTHERS — Appellants

and

REGINAM — Respondent

Sahu Khan for the Appellants
Suresh Chandra for the Respondent

Date of Hearing: 4th November, 1981
Delivery of Judgment: 25 NOV 1981

JUDGMENT OF THE COURT

Gould V.P.,

Some 22 persons were convicted by the Magistrate's Court on charges of Breach of Contract of Service affecting an Essential Service, brought under sections 14(1) and 37 of the Trade Disputes Act (then known as the Trade Disputes Act, 1973); fines of $20 on each person were imposed. They appealed to the Supreme Court against conviction and on the 15th May, 1981, their appeals were dismissed. They now bring the present appeal to this Court and on it are restricted by section 22(1) of the Court of Appeal Act (Cap.12 - Laws of Fiji; 1978 Ed.) to grounds of appeal which involve a question of law only.

By way of summary, accuseds 1-9 (inc.) were charged and convicted on Count 1 (accused 10 was dropped). Accused 11 was convicted on Count 2, accuseds 12, 13, 14 and 15 on Count 3, accused 16 on Count 4, accused 17 on Count 5, accuseds 18 and 19 on Count 6, accuseds 20, 21 and 22 on Count 7 and accused 23 on Count 8.

The appellants have been represented in all courts by their present counsel Mr. Sahu Khan.

For the better understanding of the charges it will be well to set out section 14(1) of the Trade Disputes Act :

> "14(1) Any person who wilfully breaks his contract of service, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be -
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> (a) to deprive the public, or any section of the public wholly or to a great extent of an essential service, or substantially to diminish the enjoyment of that service by the public or by any section of the public; or
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> (b) to endanger human life or cause serious bodily injury or to expose valuable property whether real or personal, to destruction, deterioration or serious damage,
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> shall be guilty of an offence."

By way of example we take Count 1, charging accuseds 1-9 -

> "
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> FIRST COUNT
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> STATEMENT OF OFFENCE
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> Breach of contract affecting an essential service contrary to section 14(1)(a) and 37 of the Trade Disputes Act, 1973.

PARTICULARS OF OFFENCE

ALIPATE VOKAI, TOMASI NALIUTU, AISAKE DOKO, SAMUELA RARALEVU, TIMOCI NAITUKU, SERUPEPELI KALIKADINA, SAVAIO TUMAILAGI, KITIONE KABU, TOMASI KOROI between the twenty-fourth day of April, 1980 and the twenty-sixth day of May, 1980 at Vatukoula in the Western Division wilfully broke their contracts of service having reasonable cause to believe that the probable consequences of their so doing in combination with others would be to deprive the public to a great extent of an essential service, namely the supply of electricity."

The particulars of the other charges were similar. In Counts 1 and 2 the essential service relied upon was the supply of electricity, in Count 3 electricity and water, in Counts 4 and 5 the supply of water, in Counts 6 and 7 sanitary services and in Count 8 mine pumping. It should perhaps be noted that the phrase "having reasonable cause to believe that the probable consequences of their so doing in combination with others" is used in all the counts, those which charge one individual as well as those which charge a number. Reference to the evidence may become necessary when we deal with particular grounds of appeal.

The Notice of Appeal contains six grounds which read :-

"1. That the Learned Appellate Judge erred in law in not upholding the Appellants and dismissing the charges against the Appellants inasmuch as there was no proper proof that the prosecutions of the Appellants were commenced by or upon the directions of the Director of Public Prosecutions inasmuch as specific objections were raised as to such requirements by the Appellants at the commencement of the hearing of the case in the Magistrate's Court.

2. That the Learned Appellate Judge erred in law in not upholding the Appellants and dismissing the charges against the Appellants inasmuch as the charges were defective in substance and in form and more particularly -

(a) Several Appellants were wrongly joined together in one Count;

(b) That the charges did not disclose any offence known in law;

(c) The charges were defective for duplicity;

(d) There were misjoinders of counts in one information.

3. That the Learned Appellate Judge erred in law in not upholding that Appellants in that the Appellants could not be convicted as there was no evidence as to the terms of contract of employment allegedly breached by the Appellants.

4. That the Learned Appellate Judge erred in law in not upholding the Appellants contention that the Learned Trial Magistrate erred in law in not dealing with the evidence against the each Appellant separately.

5. That the Learned Appellate Judge erred in law in not upholding the Appellants in that, that the Learned Trial Magistrate did not properly and/or adequately consider the defence case.

6. That the Learned Appellate Judge erred in law in not upholding that the Learned Trial Magistrate did not adequately and/or properly direct himself and/or consider the question of burden of proofs as to the issues involved."

Ground 1 arises from section 40 of the Trade Disputes Act, 1973 (we will refer to it as "the Act" and continue to refer to section numbers from that edition) which enacts that no prosecution for an offence under the Act shall be commenced except "by or upon the directions of the Director of Public Prosecutions". In the Magistrate's Court Mr. Dyfed Williams appeared for the prosecution; it is well known that he has been conducting prosecutions in Fiji Courts for a substantial number of years. After the pleas had been taken; he tendered the consent of the Director of Public Prosecutions. It was signed by D. Williams, Acting

Director of Public Prosecutions and dated 26th May, 1980. The trial commenced on the 3rd July, 1980. On objection by Mr. Sahu Khan, Mr. Williams tendered a copy of the Fiji Royal Gazette No.29 of 1980 showing the appointment of Mr. D. Williams as Acting Director of Public Prosecutions as from the 22nd April, 1980. Mr. Sahu Khan is recorded as taking the following objections : (a) Do not accept the D.P.P.s appointment in the Gazette, (b) Mr. Williams not properly appointed - he is not a Fijian citizen - section 85(2) of the Constitution, (c) The Gazette must be proved by evidence. The learned magistrate overruled these objections.

Objection No. 2 has never been pursued and Mr. Sahu Khan acknowledged in this Court that it was invalid. The remaining objections were particularly technical.

We think it a pity that so patently unmeritorious a matter should have been brought to the stage of a second appeal. As the learned judge pointed out, under section 55 of the Interpretation Ordinance (Cap.7 - Laws of Fiji Ed. 1978) the consent tendered was prima facie evidence that it was the consent of the Director of Public Prosecutions without proof of the signature. If indeed it was necessary to prove Mr. Williams' acting appointment, in our opinion it was validly done by tendering in evidence at an appropriate time the relevant copy of the Gazette, which was, by section 63 of the Interpretation Act admissible in evidence without any proof of publication or printing and was directed by that section to be accepted as evidence of (inter alia) appointments. To any extent that the case of Hira v. Reginam (1967) 13 F.L.R. 176, mentioned by counsel for the appellants may be thought to contain dicta to the contrary, it is clearly distinguishable.

This Court dealt with a similar ground of appeal to the present one, in Dhansukhlal v. Reg. (Cr. App. No. 21 of 1978) and do not need to repeat what we said there. Mr. Sahu Khan, however, relies upon a passage in that judgment which reads :

> "It is acknowledged, however, that if objections were taken as to the authenticity of the authorization to prosecute signed by the D.P.P. or the validity of the authorization was called in question for some other good or sufficient reason then the Crown must be in a position to formally prove the authorization to prosecute. Nothing of that sort arose in this case."

In whatever circumstances those words may apply, we agree with the learned judge in the Supreme Court that where the prosecution has shown, by virtue of the statute, a prima facie case that the requisite consent has been duly given, that case is not rebutted simply by taking formal objection. There is no merit in this ground.

We have set out Ground 2. As argued, it raised the questions whether there was improper joinder or whether the counts were bad for duplicity. The sections of the Criminal Procedure Code (Cap.21 - Ed. 1978) relevant to these topics are 120 and 121. They read :

> "120.(1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts or form, or are part of, a series of offences of the same or a similar character.
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> (2) Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.
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> (3) Where, before trial, or at any stage of a trial, the court is of opinion that a person accused may be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, or

that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information, the court may order a separate trial of any count or counts of such charge or information.

121. The following persons may be joined in one charge or information and may be tried together, namely -

(a) persons accused of the same offence committed in the course of the same transaction;

(b) persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence;

(c) persons accused of different offences provided that all offences are founded on the same facts, or form or are part of a series of offences of the same or a similar character;

(d) persons accused of different offences committed in the course of the same transaction."

We are in agreement with the learned judge in the Supreme Court that there was no duplicity; as he states, duplicity only arises when a person is charged in one count with two distinct offences. Even in Count 1 it is obvious that each person is being charged with breaking his own contract of service. It would not be within his power to break the contract of somebody else. The element of combination mentioned in the particulars has reference to the question of the "reasonable cause to believe" of the individual and does not involve him in more than one offence.

The other aspect of the matter, the allegation that there was wrongful joinder of more than one person in a single count, is more complex. It applies to Counts 1, 3, 6 and 7 only. Section 120 applies to

cover cases of duplicity but subsection (2) in our view is intended to apply to more than one offence by the same person, leaving joinder of persons to be covered by section 121. The justification for the joinder in the present case would fall within subparagraphs (c) and/or (d) and we do not find any convincing reason why the words "charge or information" as used in the section should be construed as excluding the meaning, where appropriate, of "a count" in such a charge or information. The elasticity which can be given to the meaning of such phrases is well illustrated by the judgment of their Lordships of the Privy Council in Attorney General v. Hari Pratap (Privy Council Appeal No. 10 of 1969) on appeal from this Court. In our opinion section 121(c) and (d) are to be construed in the light of the words used by Lord Diplock in the House of Lords in D.P.P. v. Merriman (1972) 56 Cr. App. R. 766 at 796 -

> "Where a number of acts of a similar nature committed by one or more defendants were connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise, it was the practice, as early as the eighteenth century, to charge them in a single count of an indictment. Where such a count was laid against more than one defendant, the jury could find each of them guilty of one offence only; but a failure by the prosecution to prove the allegation, formerly expressly stated in the indictment but now only implicit in their joinder in the same count, that the unlawful acts of each were done jointly in aid of one another, did not render the indictment ex post facto bad or invalidate the jury's verdict against those found guilty. To quote Hawkins again: 'On such indictment..... some of the defendants may be acquitted, and others convicted; for the law regards the charge as several against each, though the words of it purport only a joint charge against all.'"

That appears to us exactly to cover the counts to which objection is taken here and in our opinion it

was open to the learned magistrate to convict or acquit any of the persons included in the charges in question. We therefore reject this ground of appeal.

Ground 3 alleges that there was no evidence of the terms of the contracts of service of the appellants. If that can be established it can be said to raise a question of law as, to prove its case, the prosecution had to establish a breach of those contracts. Mr. Sahu Khan's argument was that there was no evidence to show under what circumstances a worker could leave his employment, particularly when it appeared that the categories of service differed. The learned judge in the Supreme Court found that there was enough evidence that the appellants worked for Emperor Gold Mines Limited - the name of the employer is not mentioned anywhere in the charges or particulars. That finding, however, hardly goes far enough. The challenge is to the lack of evidence of the terms of that employment.

Mr. Chandra, for the respondent, put it as a matter of inference that the contracts of service were broken. The contracts may have been in writing or oral and the mere fact that the appellants had absented themselves from work raised the assumption that, under the terms of service, they were supposed to be working at the particular times. We think that a more effectual base for this inference is provided by the statements (not on oath) which all the appellants made in court and in the same terms. They stated their reasons for deciding not to go to work. They received a message that they could go on strike if they voted for it. They believed all the formalities of strike had been complied with on their behalf. There was a dispute (over the recognition of the National Union of Mine Workers) and they decided not to go to work until the dispute was settled. The fact that the appellants regarded themselves as going

on strike is a firm indication that they were absenting themselves at a time when they ought, as part of their normal employment, to have been working. In the prosecution case, a similar inference arises from the evidence of Mr. J.S. Morrison, power station superintendent and Mr. R. Lloyd, a superintendent of the mechanical section of the mines, as to the dates of absence of the appellants from their work; it was clearly intended to convey that those absences occurred when the persons concerned should have been working. In our view this was the only aspect of the terms of service that required to be proved, and we consider it to have been sufficiently covered by the evidence.

Ground 4 claims that the magistrate erred in law in not dealing with the evidence against each appellant separately. In the Supreme Court the learned judge dealt with the same argument as follows :

> " What had to be proved was that each appellant worked for E.G.M. that his employment related to an essential service, that he withdrew his service in circumstances amounting to a breach of contract and that an essential service was endangered. The learned magistrate in ruling that there was a case to answer considered each count, to which essential service it was directed and to each accused. He stated that there was prima facie evidence that the essential services were endangered. He said from time to time that there 'was evidence' when referring to various submissions. I would not be prepared to assume that the learned magistrate made such statements without paying careful regard to the evidence he had recorded. In fact where he found the evidence to be insufficient he said so and he found no case to answer in regard to accuseds 24 on count 9 and accuseds 25 to 30 on count 10.
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> Following his ruling each 17 appellants made an unsworn statement a foolscap sheet in length and containing 11 short paragraphs. They were already written and were read out as they were handed in. Except for the odd word the statements are identical. In every statement the maker admitted that he worked for the Company and most

stated that they lived in a company house. In every statement at paragraph 7 refers to the strike saying 'I stayed away from work for two reasons', and explains that they thought formalities had been complied with which they made their withdrawal of labour legal.

There could be little point in the magistrate referring 23 times to the same statement and in relating the same piece of prosecution evidence separately for each accused. He considered the evidence against the appellants in finding a case to answer.

In Dhinsukhlal's case (supra), at p.1019 of the typescript, the F.C.A. dealt with a similar ground of appeal. They noted that separate defences were not advanced by any of the appellants; and that the evidence showed that each appellant had the common intention of withdrawing his labour. They said 'Had the magistrate gone through the evidence in respect of each appellant separately it would have been repetitive.'"

The learned judge dismissed the ground of appeal and we do not think he erred in law in doing so. In this Court Mr. Sahu Khan pointed out certain aspects of the dates charged for the offences. In Count 1 it was "between the 24th April, 1980 and the 26th May, 1980, Count 2 between the 25th May, 1980 and the 26th May, 1980, Count 3 between the 23rd and 26th May, 1980, Count 4 between the 29th April, 1980 and the 26th May, 1980, Count 6 between the 23rd and 26th May, 1980, Count 7 between the 24th April, 1980 and the 26th May, 1980 and Count 8 between the 23rd and 26th May, 1980".

Mr. Sahu Khan argued that the magistrate considered all the evidence as a whole and made no reference to the differences between the various counts. As to this we think all that we can say is that if the various appellants had made points relying upon the differences in dates, or adverted to them in

their statements the magistrate might have been expected to deal with them and no doubt would have done so. Short of the introduction of a further appeal on fact based on the element of combination with others (which is not open to the appellants) we do not find anything in this ground which can avail the appellants.

Grounds 5 and 6 were taken together and resolved themselves into a question of onus in two respects. The first was that the magistrate was mistaken in holding that the onus of availing themselves of the protection given by section 17 of the Act lay upon the appellants. Section 17 reads :

> "17. No person shall be guilty of an offence under the provisions of section 14 of this Act, if twenty-eight days have elapsed since the date on which the strike or lock out was accepted by the Permanent Secretary and the dispute has not within that time been settled or directed by the Minister to be referred to a Tribunal for settlement."

In his judgment the learned judge in the Supreme Court took the view that section 17 was in the nature of a proviso intended to protect those involved in an industrial dispute. It was inserted for the protection of the persons charged be they employer or employee and it is for them to produce the necessary evidence. Mr. Sahu Khan pointed out that Williams J. in A.J.C. Patel Bros. v. Prices and Incomes Board (Cr. Ap. 110/78 - S.C.) (after considering the effect of section 144A of the Criminal Procedure Code) had come to a different conclusion in relation to the legislation then before him. That legislation was, however, an order under the counter inflation legislation and in no way resembles that now before the Court.

Section 144A (inserted in the Criminal Procedure Code in 1969) is now section 144 of the 1968 Edition of the Laws, and reads :

> "144. 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 negatived 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."

This section was enacted before the case of Edwards (1974) 59 Cr. App. R. 213 which considered this subject with great care. We think it desirable to quote the following passage from the judgment of the Court of Appeal, at p.221 -

> " In our judgment this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely upon the exception.
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> In our judgment its application does not depend upon either the fact, or the presumption, that the defendant has peculiar knowledge enabling him to prove the positive of any negative averment. As Wigmore pointed out in his great Treatise on Evidence, this concept of peculiar knowledge

furnishes no working rule (1905 ed., Vol. 4, p.3525). If it did, defendants would have to prove lack of intent. What does provide a working rule is what the common law evolved from a rule of pleading. We have striven to identify it in this judgment. Like nearly all rules it could be applied oppressively; but the Courts have ample powers to curb and discourage oppressive prosecutors and do not hesitate to use them.

Two consequences follow from the view we have taken as to the evolution and nature of this exception. First, as it comes into operation upon an enactment being construed in a particular way, there is no need for the prosecution to prove a prima facie case of lack of excuse, qualification or the like; and secondly, what shifts is the onus: it is for the defendant to prove that he was entitled to do the prohibited act. What rests on him is the legal or, as it is sometimes called, the persuasive burden of proof. It is not the evidential burden."

In our opinion section 14, under which the charges here are laid, prohibits the doing of an act and renders it an offence. Section 17 obviously creates either an exception, exemption or excuse (perhaps the latter is the better word) and section 144 of the Criminal Procedure Code makes it quite clear that it is not material that the excuse is not created by the same but a separate section. The magistrate's opinion was, in our view, correct.

The second limb of the argument on this ground arises from the fact that one element of the offence under section 14 is that the breaking of the contract must have been done wilfully. The magistrate considered this aspect of the matter and accepted, from Reg. v. Walter (1934) Cr. App. R. 117, 122 the statement - "wilfully means the act is done deliberately and intentionally but so that the mind of the person who does the act goes with it".

There has been no challenge by the appellants to this interpretation. Later, the magistrate said :

> " Learned counsel has also submitted that the accused persons acted under a mistake of fact, i.e. believing in a state of things which if they existed would absolve them of any criminal liability. With respect there is nothing in the evidence which would make this belief tenable bona fide and honestly. No notice was in fact given at all by the Union or the individual accused persons who each have stated that they acted independently of other accused persons in the belief bona fide of the Union having complied with the requirements of the 28 days notice and had in such a belief withdrawn his service. I am not satisfied that the accused persons or any one of them held any such belief honestly.
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> I am satisfied that each of the accused persons was aware of the provisions of section 16 of the said Act and each had failed to comply with the provisions of the requisite notice."

Mr. Sahu Khan contended that in the sentence saying he was "not satisfied" that the accused persons or any one of them held any such belief honestly, the magistrate placed the onus upon the appellants to show that they had not acted wilfully.

What the magistrate was doing was dealing with the claim that the appellants had acted under a mistake of fact. Section 10 of the Penal Code (Cap.17 - Ed. 1978) provides that "a person who does ..... an act under an honest and reasonable, but mistaken, belief in the existence of any state of things ....." is not criminally responsible (with certain limitations). The magistrate was repeating what he had just said, that there was nothing in the evidence which would make the alleged belief tenable, bona fide and honestly, and was saying that he did not believe the assertion of the appellants concerning their alleged mistake. He was, in our opinion, adjudicating upon the whole of the evidence.

In any event a belief is a personal and subjective matter, and it must be upon the person relying on it to adduce at least sufficient evidence to show the existence of a material issue. In the present case the magistrate was not satisfied that this had been done and we do not think that he can be said to have misdirected himself as to onus in saying so. If we are wrong in this, we are satisfied that the magistrate's choice of words did not manifest a wrong approach on his part and no miscarriage of justice resulted; we would accordingly apply section 22(6) of the Court of Appeal Act.

For the reasons we have given the appeal is dismissed.

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Vice President

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Judge of Appeal

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Judge of Appeal