

IN THE HIGH COURT OF FIJI
(At Suva)
Civil Jurisdiction
Action No. 370 of 1988

IN THE MATTER of the jurisdiction
of the Chief Magistrate under the
Rotuma Act, Cap. 122

AND IN THE MATTER of section
11(2) of the judicature 1988
and other Decrees as they apply
to Rotuma

AND IN THE MATTER of a sedition
charge.

BETWEEN:

AFASIO MUA AND SEVEN OTHERS

Plaintiffs

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS

Defendant

Mr. Tevita Fa for the Plaintiffs
Mr. I. Mataitoga for the Defendant

DECISION

This is an application by way of originating summons brought on behalf of the plaintiffs, all of whom are Rotumans residing in Rotuma. They are facing charges of sedition under section 66 of the Penal Code (Cap. 17) before the District Officer's Court in Rotuma.

In their application the plaintiffs seek from this Court the following declarations:-

"1. A declaration that the jurisdiction of the Chief Magistrate conferred on him by virtue of his appointment to hear and determine criminal cases under the Rotuma Act Cap. 122 no longer exists in law in as far as the island of Rotuma and its people are concerned

or alternatively

2. A declaration that the Declaration of Fiji as a Republic in 1987 was repugnant to the Rotuma Deed of Cession of November, 1879.

or alternatively

3. A declaration that the Rotuma Act Cap. 122 and all lawful enactments affecting the Island of Rotuma which were abrogated by Decrees whilst indeed have been revived by Decrees are not enforceable in Rotuma until such time when the Rotumans through their Chiefs have signified their willingness to join the Republic of Fiji."

The application is opposed by the Director of Public Prosecutions who seeks an order that the application be struck out on the grounds that it is frivolous and vexatious and an abuse of the process of the Court. The other ground of objection was that the application was intended only to prejudice, embarrass and delay the expeditious and fair trial of the plaintiffs.

I am obliged to both counsel for their clear and succinct submissions on the issues raised by the application from which I have derived much assistance. I would also say that I sympathise greatly with Mr. Fa with regard to the dilemma he has found himself in about criticisms of his role in taking up what would appear to be a politically controversial case. I accept that he is merely doing what he is expected to do in discharging his professional duties to his clients in the best traditions of the law and I

warmly congratulate him for it. I hope other lawyers will play their role in defending the causes of their clients in the same fearless independent and professional manner and bring pride and honour to the legal profession. It is all a matter of integrity and independence of the profession which from time immemorial has always protected the weak against the strong. It is a pity and a cause for sadness that sometimes members of the public find it difficult to appreciate that when in Court lawyers are solely concerned with legal matters and their interpretation in the context of any given state of facts whether these be social, religious, political or whatever. The fact that a case happens to have strong political overtones should not hasten people to jump to the conclusion of identifying a lawyer with any particular political cause. He is there to assist the Court to put the best legal complexion on the case which he is advocating.

The main contention for the plaintiffs is that the declaration of Fiji as an independent republican State on 7th October 1987 did not bind and had no application to Rotuma because Rotuma was never mentioned and significantly was left out in such declaration of republican status for Fiji. Mr. Fa claims the position was especially poignant for the Rotuman people in that the republican document merely made reference to indigenous Fijians and not to indigenous Rotumans. According to Mr. Fa the inference was inescapable that Rotuma was no longer to be governed as part of Fiji and by necessary legal implication Rotumans must now fall back on their Deed of Cession signed in 1879 and their customs, culture and tradition as their fore-fathers did before them. It is claimed that this is consistent with the respective histories of the two countries, both of which had signed separate Deeds of Cession to Great Britain. With the dismantling of the constitutional structure of Fiji under which Rotuma was a partner by virtue of the Deed of Cession of Rotuma the partnership could not be said to have survived those changes in point of law.

According to Mr. Fa the declaration of republic of Fiji had left a vacuum in the continuity of the laws in so far as their application to Rotuma is concerned. For these reasons it is submitted that the laws of Fiji are ineffectual and have no application to Rotuma.

The main contention for the defendant is that the continuity of the laws of Fiji which were in force before the 25th September 1987 have been preserved for all practical purposes. In the Interpretation Act (Cap. 7) "Fiji" is defined as including also Rotuma and its dependencies. According to Mr. Mataitoga the very fact that the same laws which existed before the second military coup have been preserved to the time of the declaration of Republic and thereafter clearly indicated that the applicability of existing laws to Rotuma were never in doubt at any stage despite the political upheavals. Mr. Mataitoga submitted that there could be no inconsistency or repugnancy as between the laws of Fiji which were in force at all material times with the act of declaration of Fiji as a republican State made on 7th October, 1987. There was therefore no question of any afterthought about the applicability of existing laws to Rotuma. Mr. Mataitoga also said that there is overwhelming evidence that the Chiefs and people of Rotuma have expressed their desire to continue their historic association with Fiji. An affidavit to that effect has been sworn and filed by a former district officer of Rotuma. He said this is significant because any attempt at disannexation by the Rotuman people should be approached solemnly following the spirits of their Deed of Cession. Mr. Mataitoga made the point that not to regard Rotuma as part of Fiji would have disastrous and catalysmic consequences for the people of Rotuma. He said the law particularly in a constitutional context must be interpreted sensibly and reasonably to enable the continuation of a reasonable state of affairs for the nation. He cited a number of well-known cases on the interpretation of Constitutions to support his proposition

that a purposive and generous interpretation should be given such documents. He contends that in the absence of a Constitution for Fiji the early decree documents should be treated as constitutional documents for interpretation purposes.

As a matter of history Rotuma was annexed to be part of Fiji by Letters Patent made in the name of Her Majesty Queen Victoria on 17th December, 1879. The annexation of Rotuma was completed on 5th November 1880 when a Proclamation was made by the Governor of the Colony of Fiji in which he pronounced himself in this operative assertion:-

"(I) do hereby proclaim that the said Island of Rotuma is and from this day henceforth shall be taken to be a part of the said Colony (of Fiji)."

The annexation of Rotuma was made pursuant to the wishes of the Chiefs of Rotuma as signified by them in the Deed of Cession of Rotuma made in November 1879 wherein they solemnly prayed:-

"that Her Majesty will be pleased to extend to us such laws as now govern her Native subjects in the Colony of Fiji, or such other laws as in Her Majesty's wisdom she may see fit to make and appoint for our Government and for her maintenance of peace and good order."

The prayers of the Chiefs of Rotuma were acknowledged with the following declarations which were adumbrated in the aforesaid Letters Patent as follows:-

"WHEREAS the chiefs of the Island of Rotumah, in the Western Pacific Ocean, have prayed Us that We would rule their island and receive them as Our subjects: And whereas We are minded to accede to the prayer of the said Chiefs, and to accept the said Island and its Dependencies as part of Our Dominion, and to provide for the good government of the inhabitants thereof, and for that purpose to provide that the said Island and its Dependencies shall be annexed to and form part of Our

Colony of Fiji: Now therefore We do hereby authorise Our Governor for the time being of Our Colony of Fiji, by Proclamation under his hand and the Public Seal of Our said Colony, to declare that the Island of Rotumah and its Dependencies that is to say, all islands, rocks, reefs, and fisheries lying between the 12^o and 15^o of south latitude and between the 175^o and 180^o of east longitude from the meridan of Greenwich shall thenceforth form part of our Dominions.

II. And we do hereby further authorise Our Governor for the time being of Our said Colony of Fiji, by the same or any other Proclamation under his hand and the Public Seal of Our said Colony, to declare that, from and after a day to be therein named, the said Island of Rotumah and its Dependencies, as above described, shall be annexed to and form part of Our said Colony of Fiji; and we do hereby declare that, on and after the day so to be named, the said Island of Rotumah and its said Dependencies shall form part of Our said Colony of Fiji, and shall be subject to the laws from time to time in force therein.

III. And We do hereby appoint and declare that, on and after such day, all such powers of governments and legislation as are from time to time vested in Our Governor or other the person for the time being administering the government of Our Colony of Fiji and in the Legislative Council thereof, shall apply and extend to the said Island of Rotumah and its said Dependencies had at all times formed part of Our said Colony."

From 5th November, 1880 Rotuma became well and truly a part of Fiji in the sense that it ceased to have any independent or separate national existence. This state of affairs continued and was further consolidated in 1970 when Fiji shed its colonial garb on attaining independent sovereign status from Great Britain. It was clearly understood and accepted that Rotuma would continue to be as much a part of independent Fiji in the same way as all other islands in the Group. This was reflected in a number of legislative provisions of the new independent nation of Fiji. It would appear

from this brief historical excursion into the past that whether one likes or not the destiny of Fiji is intricately, if not irrevocably interwoven.

On 14th May 1987 an unprecedented military coup d'etat took place in Fiji and resulted in the overthrow of the government under the Prime Minister Dr. Bavadra. On 25th September, 1987 a second military coup d'etat took place. This resulted in the abrogation of the 1970 Constitution of Fiji and the declaration of Fiji as a republican State on 7th October, 1987.

Although these events have fundamentally altered the political and constitutional structure of Fiji, significantly they did not change the nature or viability of the legal system of the country. Our legal system which was inherited from the British has remained intact. This has come about because succeeding governments that have taken over in running the country have deemed it fit to retain the full panoply of laws which were in force immediately before the 25th September, 1987 with more or less the same judicial structures as was in place before the second military coup.

However, the question must now be faced and faced for the first time by a Court of law as to what happens now when the political and constitutional structure of the country as bequeathed to it by the 1970 Constitution has been completely overturned by unprecedented revolutionary events. This is the crux of this case as I see it.

In the absence of a constitution for Fiji and given all the circumstances surrounding this matter I would think that there is no alternative but to regard as overriding the de facto situation as presently obtains with respect to the legal relationships of the people

as between themselves and as between them and the sovereign State of Fiji. This follows from the principle that the legal relations of the people in any well ordered society cannot be left in a vacuum, so to speak. This makes it possible for the conduct of the affairs of the nation to be regulated and carried out in an orderly and civilised manner. This approach to the problem at hand if indeed it is a problem is necessitated by the very concept of State sovereignty.

In any event, it must be pointed out that the onus is on the plaintiffs to satisfy this Court by credible evidence that Fiji and Rotuma no longer function as one nation and the legal ramifications implicit in the de facto situation I have just spoken about does not apply as a matter of State necessity. I think it goes without saying that apart from their constitutional history, the two countries have over the years been drawn closely together by a common bond of friendship and trust and shared interests. Thus to say that a territorial disannexation of one of them from the other has occurred as alleged by the plaintiffs must be viewed with grave reservations. Another important factor placing great difficulties in the path of the plaintiffs is the assertions contained in the affidavit of Viki Elaise Epeli who was the District Officer of Rotuma from December 1986 to February 1988. His depositions are most illuminating in attesting to the political thinking of the Rotuman people when they were faced with the political and constitutional crisis that arose last year. This is what he swore to:-

"As District Officer, Rotuma, one of my duties was to be the Secretary of the Rotuma Island Council; which Council is composed of the Chiefs of Rotuma and the representatives of the Seven (7) Districts of Rotuma.

It was part of my duty to attend to the Meetings of the Rotuma Island Council and the District Meetings when they are called.

After the Military Coup of 14 May 1987 in Fiji an emergency session of the Rotuma Island Council was called on the 19th of May 1988 to discuss the position of Rotuma. At this meeting the Chiefs of Rotuma resolved to pledge their support to the then military Government and to remain part of Fiji. This resolution was communicated to the then Head of Government by letter.

A Meeting of the Rotuman Island Council was held on 7 July 1987 and it was resolved at this meeting for the Council representatives to attend the Great Council of Chiefs Meeting in Fiji to be held in late July; and to express yet again in clear terms Rotuma's desire to remain part of Fiji.

In mid July 1987 I accompanied the delegation of the Rotuma Island Council to Fiji to attend the Great Council of Chiefs Meeting. At this meeting the Chairman of the Rotuma Island Council Mr Aisea Aitu pledged the loyalty of the people and the chiefs of Rotuma to remain part of Fiji and its government.

On the return of Chiefs of Rotuma from the Great Council of Chiefs Meeting; district meetings were held in all the seven (7) Districts of Rotuma to ascertain the views of the people of Rotuma. I attended all these Meetings in my capacity as District Officer Rotuma. It was the overwhelming view of the majority of the Rotuman's who attended these meetings, that Rotuma should remain part of Fiji, even if Fiji were to become a Republic.

The views of the people and the chiefs of Rotuma to remain part of Fiji was communicated to the then Governor General, Ratu Sir Penaia Kanatabatu Ganilau by letter in late July.

Following the second Military Coup of 25 September 1987, the Rotuma Island Council met again on the 29 September 1987 and discussed the position of Rotuma. It was resolved that Rotuma must remain part of Fiji and part of the Republic of Fiji if that were to eventuate.

At another meeting of the Rotuma Island Council held on 21 December 1987, the Council resolved yet again to remain part of the Republic of Fiji. This resolution was communicated to the President of the new Republic of Fiji by letter dated 29 December 1987, with a copy to the Prime Minister, Ratu Sir KKT Mara. "

The above assertions appear in my view firmly to indicate that the preponderance of Rotuman feeling in the matter is for continued political association with Fiji as it journeys into the unknown future.

The de facto situation governing the present state of affairs in Fiji and Rotuma shows that all laws existing immediately before the 25th September 1987 in so far as they have not been revoked continue to be operative and valid. Among these laws are the Interpretation Act (Cap. 7) and the Rotuma Act (Cap. 122). Section 2(1) of the former Act defines "Fiji" as also including Rotuma while section 3(1) of the Rotuma Act states as follows:-

"3. - (1) Except in so far as Rotuma has been expressly excluded from the provisions thereof, all Acts are hereby declared to apply to Rotuma."

The above provisions leave no doubt that the Penal Code as part of the laws of Fiji applies just as much to Rotumans living in Rotuma as it does to any other people living in Fiji. That being so and having regard to the relevant provisions of the Rotuma Act, I am satisfied and would hold that the District Officer's Court in Rotuma is lawfully vested with the power, authority and jurisdiction to hear the case of all eight plaintiffs who are presently facing charges of sedition in Rotuma.


On a broader plane I also hold that for legal and other purposes Rotuma continues to be a part of the independent sovereign State of Fiji.

I believe the conclusion I have arrived at accords fully with the legal doctrine embodied in the classic maxim: salus populi suprema lex: (regard for the public welfare is the highest law). In my view if the plaintiffs' contention were to be given full literal effect the people in Rotuma would without rhyme or reason have removed from them the protection of the law and soon they would find themselves in a situation where the law of the jungle takes over. Surely that cannot be right as a matter of basic common sense and political necessity.

Rotuma became part of Fiji by the most solemn act of faith and trust on the part of the Chiefs and the people. I should imagine that if Rotuma should ever want to sever its historic and well-established links with Fiji the least that would be expected of them following the noble precedent set by their illustrious forebears would be to conduct full consultations with the government for the time being representing the independent sovereign State of Fiji. This Court at any rate would not act if it is sought to do so unless there is produced before it a Deed of Disannexation or some other similar solemn document recording the wishes of the Chiefs and people of Rotuma.

However, that possibility looks rather remote on present evidence pertaining to the political philosophy of the Chiefs and people of Rotuma.

In these circumstances the declarations sought by the plaintiffs must be refused with order for costs.


(T. U. Tuivaga)
Chief Justice

9th June, 1988

