

IN THE HIGH COURT OF FIJI
AT SUVA

CRIMINAL JURISDICTION

CRIMINAL MISC. CASE NO.: HAM 76 OF 2006

BETWEEN:

SITIVENI LIGAMAMADA RABUKA

Applicant

AND:

STATE

Respondent

Counsel: Mr. P. Maiden SC)
Mr. P. Sharma) – for the Applicant
Ms Tamanikaiwaimaro)

Mr. M. Tedeschi QC)
Mr. R. Gibson) – for the State
Mr. A. Ravindra-Singh)

Date of Hearing & Ruling: 9th November, 2006

RULING

- [1] At the conclusion of my Ruling on the abuse of process application this morning learned senior counsel for the defence advised that he wished to make an application for adjournment. That application was based on three (3) grounds.
- [2] First, a demurrer in respect of the information. Secondly, the late amendment to the first count as to the date frame and lastly in respect of the potential unavailability of a witness Mr. Lomaloma. I will deal with each matter in turn.

- [3] In respect of demurrer counsel summarizes his potential argument by saying that the history of the country at the time these allegations were made was such that the offending may have happened during the course of the nation's rule by Military Decree.
- [4] He confesses that he is not familiar with the nation's Constitutional History but says that he has concerns that the Commander of the Army, Commodore Bainimarama may at the relevant time in both the first and second counts have held other positions within the Military or Civilian Administration and that accordingly the indictment may in some way be improper or invalid.
- [5] He says that the Constitutional principles talked about in *Prasad* may apply and that the ~~appointment of the Commander either to his position as the Head of the Republic's~~ Military Forces or in some other Civilian capacity may not have been valid. Therefore any mutinous act concerning him would not be a proper allegation to bring as logically one could not have mutiny against an invalidly appointed Head of the Army or Interim Government.
- [6] In respect of that application on demurrer I prefer the interpretation placed on it by learned counsel for the Prosecution. Those sorts of considerations don't go to demurrer in my view these are matters not going to the validity of the indictment or its propriety. They go right to the heart of the defence and indeed it is conceded today by the State that an argument might be run that if the assessors think it is a reasonable possibility that the subject conversations between the accused and Colonel Seruvakula concern the removal of Commodore Bainimarama in some other capacity other than as Head of the Military Forces then they would be entitled to acquit and in that regard he is correct.
- [7] I hold that the informations are valid and appropriate charges upon which the accused can stand trial.
- [8] The next matter is the question of the late amendment of the date frame in the first count. Learned counsel complains that this late amendment will prejudice the defence as they will now have to turn their minds to a consideration of time, place and circumstance of over a 17-day time frame and make appropriate enquiries and take appropriate instructions about the possibility of any available defences.

- [9] In my view, the question of the date frame while perhaps going to the defence is not an essential ingredient of the charge and therefore any enquiries that might need to be made can be dealt within a relatively short adjournment. I note in respect of the defence that learned senior counsel is leading two juniors. I am confident that their disposition on the matter immediately to make enquiries concerning this 17-day period will not be an onerous or burdensome task for them and would be capable of being performed within a matter of 2 or perhaps 3 days. Accordingly I would not grant an adjournment in respect of that amendment to the indictment beyond Monday of next week.
- [10] Concerning the general matters raised. Counsel avers that it was never certain that this substantive trial would proceed this week. I completely reject that submission. This matter has been listed at the convenience of counsel for some 3 months. I have made it clear that the court's calendar has been cleared for November to particularly deal with the matter. I adopted that approach to ensure that the speedy trial rights of the accused were met and also to ensure that witnesses who would have to be called from overseas could be made available.
- [11] The prime prosecution witness Colonel Seruvakula has had some trouble coming to Fiji from Afganistan and has in that regard been released from his United Nations duties. Counsel submitted that a letter from the Under Secretary-General concerning the release of the witness indicated that he would not be made available for this week. That is not the position rehearsed in Chambers before me last week. When the matter was raised the letter from the U.S.G. only set the background. It was not a question of whether the Colonel would come to Fiji for the trial but more a question of the length of time he may be available for. As I understand that situation has now been resolved. The witness is here and ready to proceed.
- [12] The final matter that the defence raised is the potential unavailability of a witness Mr. Lomaloma who the State do not wish to call for principled reasons. In respect of that witness he is on duty or lives in the Solomon Islands. The defence say that they are able to bring him here but there may be some delay. They will have to make last minute travel arrangements for him. Again I am confident that a short adjournment in the matter may provide some adequate relief in that regard. There is of course always an

alternate. The court has available to it an audio visual system in Courtroom 2. It is frequently used to conduct hearings and take evidence from both around Fiji and overseas. I am advised by the Prosecution that they have made enquiries and that an audio visual facility is available in the Solomons. I am prepared to order that the witness's evidence could be taken by audio visual link if that was of some assistance.

[13] Accordingly I refuse the application for adjournment to this extent. Learned senior counsel for the defence wanted an 8-week adjournment. I don't see that as reasonable. However, in the circumstances I am prepared to adjourn the matter with the trial to start on Monday morning at 10.00am to allow the defence sufficient time to make the necessary enquiries concerning count one and also to make the necessary travel arrangements for the witness Lomaloma if that is required. Accordingly the trial will now start on Monday at 10.00am.

Addendum

[14] This is an addendum to my ruling having indicated my decision that the case could be adjourned till Monday the 13th of November senior counsel conferred. They have decided that they would in fact prefer the matter to proceed as scheduled tomorrow morning at 10.00am for an opening address and evidence from the prime witness Colonel Seruvakula leaving cross-examination until next week. I order accordingly.

Hon. Justice G. Winter
High Court of Fiji
at Suva

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Gerard Winter
JUDGE

At Suva
Thursday 9th November, 2006