STATE v RATU TIMOCI SILATOLU and Anor

HIGH COURT — CRIMINAL JURISDICTION

WILSON J

31 May 2002

[2002] FJHC 71

Criminal law — appeals — validity of immunity decree — power to grant pardon — crime of treason — plea of autrefois acquit — Criminal Procedure Code s 279 — Interpretation Act (Cap 7) — Interpretation (Amendment) Decree 1989 s 3 — Penal Code s 383 — State Services Decree 2000 (No 6 of 2000) s 14(2) — 1997 Constitution ss 21(1), 114, 115, 115(4), 195 — 1990 Constitution ss 99, 164 — 1970 Constitution s 88.

Ratu Timoci Silatolu and Josefa Nata were charged in the information for the crime of Treason. Each applicant had pleaded that they obtained a pardon for the alleged offence. They relied upon the Immunity Decree No 18 of 2000. According to them, the decree grants a pardon in the form of immunity from prosecution under the Penal Code.

Held — (1) The Immunity Decree did not purport to be a pardon. It is what it is and not what it purports to be that is important. The intention of those who published it is not necessary. The power to grant immunity from prosecution rests exclusively with the Director of Public Prosecutions. The Constitutional provisions relied upon do not deal expressly with the power to grant such immunity.

(2) The Constitution empowers the President to grant a pardon to a person convicted but the words pardon and offence imply that the offences have already been committed and not to be committed in the future. The Applicants derive no immunity from the decree. The Immunity Decree did not have the effect of depriving any of the acts done of their criminal character.

Stead v R (1992) 62 A Crim R 40, applied.

Appeal dismissed.

Cases referred to

Chandrika Prasad v Republic of Fiji and the Attorney-General of Fiji (High Court of Fiji Action No HBC 0217/00L, 15 November 2000); *Stead v R* (1992) 62 A Crim R 40, applied.

Asma Jilani v Government of Punjab [1972] PLD SC 139; *Attorney-General of Trinidad & Tobago v Phillip* [1995] 1 AC 396; [1995] 1 All ER 93; *Cornelius v Phillips* [1918] AC 199; *D'Arrigo v R* (1991) 58 A Crim R 71; *Government of the Republic of Vanuatu v President of the Republic of Vanuatu* (Vanuatu SC, Gibbs J, Civil Case No 124/1994, unreported); *Horn v Lockhart* (1873) 84 US (17 Wallace); *Kartinyeri v Commonwealth of Australia* (1998) 72 ALJR 722; *Murphy v Ford* (1975) 390 F Supp 1372; *Philip v Director of Public Prosecutions of Trinidad & Tobago* [1992] 1 All ER 665; *R v Milnes & Green* (1983) 33 SASR 211; *Richard West & Partners (Inverness) v Dick* [1969] 2 Ch 424; *Slack v Leeds Industrial Co-operative Society Ltd* [1923] 1 Ch 431, cited.

Edwards v Society of Graphical & Allied Trades [1971] Ch 354; *Fitzgerald v Muldoon* [1976] 2 NZLR 615; *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645; *Matadeen v Pointu* [1999] 1 AC 98; [1998] 3 WLR 18, considered.

P. Ridgeway for the State

K. Vuataki for the 1st Accused

M. Waqavonovono and *P. Narayan* for the 2nd Accused

Judgment

Wilson J. Reasons for judgment for the Honorable Mr Justice Wilson in relation to the validity or otherwise of the Immunity Decree

Part A

The plea of pardon

Each Applicant is an accused person against whom an information has been filed alleging that he committed the crime of Treason pursuant to s 279 of the Criminal Procedure Code, the Applicants have the right, before being required to plead to the information in the ordinary way, to enter a plea of autrefois acquit or autrefois convict or pardon.

Section 279 provides:

> *279. Any accused person against whom an information is filed may plead —*
>
> *(a) that he has been previously convicted or acquitted, as the case may be, of the same offence; or*
>
> *(b) that he has obtained the Queen's pardon for his offence.*
>
> *If either of such pleas are pleaded in any case and denied to be true in fact, the court shall try whether such plea is true in fact or not.*
>
> *If the court holds that the facts alleged by the accused do not prove the plea, or if it finds that it is false in fact, the accused shall be required to plead to the information.*

The word "pardon" has a wide meaning and it includes immunity, amnesty, indemnity and like aspects of what used to be known as the prerogative. The legal authorities to be referred to later in these reasons for judgment make that proposition of law clear.

In the context of the Republic of the Fiji Islands at this time, "the Queen's pardon" is to be taken as a reference to "the president's pardon" — see the Interpretation Act (Cap 7) and the Interpretation (Amendment) Decree, 1989 (s 3).

Each Applicant has pleaded that he has obtained a pardon for his alleged offence or offences. Each Applicant relies upon the immunity Decree No 18 of 2000, which he maintains is valid and grants him, along with others, a pardon in the form of immunity from prosecution under the Penal Code.

The Immunity Decree No 18 of 2000 (called "the Immunity Decree") was in the following terms:

IMMUNITY DECREE 2000
DECREE NO 18 OF 2000

WHEREAS as the result of the attempted illegal takeover of the Government of the Fiji Islands elected under the 1997 Constitution by Ilikini Naitini also known as George Speight [hereinafter referred to as George Speight] and his Group, a state of emergency was declared by the President with effect from 7.00 pm on Friday the 19th day of May, 2000;

AND WHEREAS the Bose Levu Vakaturaga having met in a special meeting over three days from the 23rd day of May, 2000 to the 25th day of May, 2000 to consider the state of emergency and the grave political unrest in the Fiji Islands, and passed ten resolutions in its endeavours to find a practical and lawful solution to the deepening national crisis;

AND WHEREAS the national crisis has caused and continues to cause serious adverse effect and implications on the national security and the people in relation to their daily lives and welfare including the national economy, the employment situation, the education system, public transport and national security and it is incumbent upon me to seek and adopt the best practical and lawful means available to me of averting a potentially catastrophic political situation;

AND WHEREAS having regard to the aforesaid resolutions by the Bose Levu Vakaturaga and the very precarious state of the nation, it is my sincere and firm belief that I shall be acting in the best and wider interests of preserving and maintaining law and order and returning our beloved country to normalcy;

NOW THEREFORE, given the immediate objectives of the Interim Military Government to secure the release of the hostages at the Parliament Complex and for the surrender and return of all weapons, ordnance and stores in the possession and control of George Speight and his Group; AND *in exercise of the powers vested in me under section 9 of the Interim Civilian Government (Establishment) Decree No 10 of 2000 and acting on the advice of the Cabinet, I hereby make the following Decree —*

Short Title and commencement

1. This Decree may be cited as the Immunity Decree 2000 and shall come into force on the 13th day of July, 2000.

Interpretation

2. In this Decree, unless the context otherwise requires "political offence" means an offence allegedly committed by any person or persons between the 19th of May, 2000 and the 13th day of July, 2000 (both dates inclusive), such offence being either directly or indirectly prompted and motivated by the attempted illegal takeover of the Government on the 19th day of May, 2000 and the political developments during that period and including any offence, which has been subject of police complaint, which was prompted or motivated by the political developments during the relevant period.

Grant of Immunity

3. (1) Notwithstanding Section 14(2) of the State Services Decree 2000 (No.6 of 2000) George Speight the Leader of the Taukei Civilian Group (sic), and members of his Group who took part in the unlawful takeover of the Government democratically elected under the 1997 Constitution on the 19th day of May, 2000 and the subsequent holding of the hostages until the 13th day of July, 2000 shall be immune from criminal prosecution under the Penal Code or the breach of any law of Fiji and civil liability in respect of any damage or injury to property or person connected with the unlawful seizure of Government powers, the unlawful detention of certain members of the House of Representatives and any other person and no court shall entertain any action or proceeding or make any decision or order, or grant any remedy or relief in any proceedings instituted against George Speight or any member of his Group.

(2) Subsection (1) also applies to any other person who acted under the directions, orders or instructions of George Speight or any member of

the Taukei Civilian Government as a result of the unlawful seizure of Government powers and unlawful detention of the Prime Minister and certain Cabinet Ministers and Members of the House of Representatives and other persons.

(3) Subject to section (4), this Decree does not extend to any other person who committed an offence under any law within and outside the Parliament Complex between the 19th day of May, 2000 and the 13th day of July, 2000 in respect of any act done without the directions, orders or instructions of George Speight or any member of the Taukei Civilian Government.

(4) Any person who commits a political offence within the meaning of this Decree shall be Immune from criminal prosecution under the Penal Code or the breach of any law of Fiji.

Miscellaneous

(1) No compensation shall be payable by the State to any person in respect of any injury to person or damage to property caused by or consequent upon any conduct for which immunity has been granted under this Decree.

(2) This Decree shall not be amended or repealed by Parliament or any other Decree.

Made at Suva this 9th day of July 2000.

COMMODORE JV BAINIMARAMA
Commander and Head of Government

The main issues arising for consideration during the hearing and determination of these applications (and the trials or *voir dire* hearings of the issues of whether each plea of pardon is true in fact or not) all depend upon the question of the validity or otherwise of the Immunity Decree. That question is of constitutional significance and practical importance to each applicant and to the respondent.

If the Immunity Decree is held to be valid, it will mean that each Applicant, although he may have "taken part in the unlawful takeover of the Government democratically elected under the 1997 Constitution on the 19th day of May, 2000 and the subsequent holding of the hostages until the 13th day of July 2000" or may have "acted under the directions, orders or instructions of George Speight or any member of the Taukei Civilian Government as a result of the unlawful seizure of Government powers and unlawful detention of the Prime Minister and certain Cabinet Ministers and Members of the House of Representatives and other persons" (see the terms of the Immunity Decree itself), will *inter alia* be immune from prosecution under the Penal Code (for treason or otherwise) or for the breach of any law of Fiji. It will also mean that each Applicant could expect to be discharged from the information and to have his freedom.

If, on the other hand, each application fails, then it will mean that each Applicant will, as a matter of procedure, *be required to plead to the information* (s 279) and, if he pleads not guilty, he will face the prospect of his trial proceeding. It would be fair and just, if that situation were to arise, for these proceedings to be adjourned (after this court's decision is announced and before each Applicant is *required to plead*) to enable each Applicant to consider his position and be advised in relation to the plea to the information he will enter upon his arraignment and in relation to the consequences that may flow from the entering of a plea of not guilty, including the possible forfeiture of an entitlement to a sentencing discount or a recommendation for the exercise of mercy (that might be included in a report of the trial judge pursuant to s 115(4) of the 1997 Constitution), as the case may be, that might be accepted as a mitigating factor indicating remorse.

The grounds relied upon to establish the invalidity of the Immunity Decree

The grounds relied upon by the respondent (expressly or by necessary implication) in order to establish the invalidity of the Immunity Decree are:

(a) That the commander of the Fiji military forces did not hold or possess any lawful authority to promulgate the Immunity Decree and that, therefore, it is invalid.

(b) That the Immunity Decree was not made pursuant to the legislative power vested in the Parliament under the 1997 Constitution and was, therefore, invalid for want of form and power.

(c) That under the 1997 Constitution, which, according to *Republic of Fiji and Attorney-General of Fiji v Chandrika Prasad,* unreported decision of the Fiji Court of Appeal dated 1st March 2001) (called "*Chandrika Prasad's* case"), has not been abrogated, the power of pardon can only be exercised by the President on the advice of the Commission on the Prerogative of Mercy, and such advice was neither given nor received.

(d) That, under the 1997 Constitution, the power of pardon is limited to the granting of a pardon or a conditional pardon or a respite or a substitution of a less severe form of punishment or a remission to persons convicted of an offence under the law of the State and to the granting of immunity from prosecution, specifically, to the leader of the military coup(s) d'etat which took place in Fiji on 14th May 1987 and on 26th September 1987 and members of the Republic of Fiji Military Forces (including the Naval Division), the Police Force and the Fiji Prison Services and others, and such conditions precedent have not occurred.

(e) That the Immunity Decree relates in part to offences not yet committed, that is to say, offences committed between the date of the Immunity Decree, viz the 9th July 2000 and 13th July 2000, and, as such, is invalid.

(f) That the Immunity Decree did not purport to be a pardon.

(g) That the grant of immunity from prosecution was unconstitutional, the power to grant such immunity resting exclusively with the Director of Public Prosecutions pursuant to s 114 of the 1997 Constitution and s 96 of the 1990 Constitution and the common law.

The importance of the Chandrika Prasad case

Of fundamental importance to the determination of the question of the validity or otherwise of the Immunity Decree and standing firmly at the gateway to any discussion of the issues that arise in this case is *Chandrika Prasad's* case above, which is binding upon this court. In that important case it was decided that the 1997 Constitution had not been abrogated, that the Parliament had not been dissolved but was merely prorogued for 6 months on 27th May 2000, and that the office of President did not become vacant until the effective date of the retirement of Ratu Sir Kamisese Mara on 15th December 2000, whereupon the Vice President took office.

The power to grant a pardon

If authority exists to grant a pardon, then that authority is derived from ss 115 and 195 of the 1997 Constitution (and Ch XIV of the Constitution of 1990), which provide as follows:

Part 5 — PREROGATIVE OF MERCY

Prerogative of Mercy

115(1) The President may:

(a) grant to a person convicted of an offence under the law of the State a pardon or a conditional pardon;

(b) grant to such a person a respite, either indefinitely or for a specified period, of the execution of the punishment imposed for the offence;

(c) substitute a less severe form of punishment for the punishment imposed; or

(d) remit the whole or part of:

(i) the punishment imposed; or

(ii) a penalty or forfeiture otherwise due to the State in respect of the offence.

(2) This subsection establishes a Commission on the Prerogative of Mercy consisting of:

(a) the Attorney-General who is to be its chairperson; and

(b) 2 other members appointed by the President, acting in his or her own judgment.

(3) In the exercise of his or her powers under subsection (1), the President acts on the advice of the Commission.

(4) [Not relevant to these applications]

Repeats and transitional

195(1) The following Acts are repealed:

Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990

Suppression of Terrorism Decree 1991

Ombudsman Decree 1987

Fiji Citizenship Act

Fiji Citizenship Decree 1987

Internal Security Decree 1988

Internal Security (Suspension) Decree 1988

Industrial Associations Act (Amendment) Decree 1991

Trade Unions (Recognition) Act (Amendment) Decree 1991

Trade Unions Act (Amendment) Decree 1991

Sugar Industry (Special Protection) (Amendment) (No 3) Decree 1991 Protection of the National

Economy Decree 1991

(2) Despite the repeal of the Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990:

(a) Chapter XIV of the Constitution of 1990 continues in force in accordance with its tenor;

(b) to (j) [Not relevant to these applications]

(3) [Not relevant to these applications]

(The emphasis is mine)

Chapter XIV of the Constitution of 1990 provides:

CHAPTER XIV

IMMUNITY PROVISIONS

Immunity of Members of the Republic of Fiji Military Forces including the Naval Division), the Police Force and the Fiji Prison Services and others

164–(1) The leader of the military coup(s) d'etat which took place in Fiji on fourteenth of May, 1987 and on twenty-fifth of September, 1987 shall be immune from criminal and civil responsibility in respect of the commission of any offence under the *Penal Code* or the breach of any law of Fiji and in respect of any damage or injury to property or person resulting either directly or indirectly from the two military coup(s) d'etat.

(1) All members of the Republic of Fiji Military Forces (including the Naval Division), the Fiji Police Force and the Prison Services who during the

two military coup(s) d'etat referred to in subsection (1) of this section and up to the fifth of December, 1987, had shown allegiance to the coup leader and obediently carried out instructions and orders of the Fiji Military Government established by the coup leader, shall be immune from criminal and civil responsibility in respect of the commission of any offence under the *Penal Code* or the breach of any law of Fiji and in respect of any damage or injury to property or person resulting either directly or indirectly from the two military coup d'etat and no court shall entertain any action or make

(2) any decision or order, or grant any remedy or relief in any proceedings instituted against any member aforesaid in relation thereto.

(3) Any person who during the two military coup(s) d'etat referred to in subsection (1) of this section and up to the fifth of December, 1987, acted under the direction of a member of the Republic of Fiji Military Forces (including the Naval Division), the Fiji Police Force and the Fiji Prison Services shall be immune from criminal and civil responsibility in respect of the commission of any offence under the Penal Code or the breach of any law of Fiji and in respect of any damage or injury to property or person resulting either directly or indirectly from so acting and no court shall entertain any action or make any decision or order, or grant any remedy or relief in any proceedings instituted against that person in relation thereto.

(4) For the avoidance of doubt:

(a) No court shall entertain any action or make any decision or order, or grant any remedy or relief in any proceedings whether criminal or civil instituted against any member of the Republic of Fiji Military Forces (including the Naval Division), the Fiji Police Force and the Fiji Prison Services or against any person acting under the direction of any member of such Forces and Services in respect of damage or injury to property or person arising either directly or indirectly from the two military coup(s) d'etat up to fifth December 1987.

(b) No compensation shall be payable by the State to any person in respect of any damage or injury to his property or person caused by or consequent upon any conduct for which immunity has been granted under this section.

(5) This section shall not be reviewed or amended by Parliament.

Those sections do not empower the President to grant a pardon to a person who may have committed an offence but who has not been convicted of an offence, save and except the leader of the military coups d'etat which took place in Fiji on 14th May, 1987 and on 25th September 1987, and others (to whom immunity was purportedly given) who may have committed an offence but were never convicted of an offence. Prior to the 1997 Constitution there was already power to grant a pardon (see ss 99 and 164 of the 1990 Constitution and, before that, s 88 of the 1970 Constitution), but there was no power to grant immunity.

The terms of the pardon were as set out in the Immunity Decree above and emphasised by me.

As previously indicated, if authority exists to grant a pardon so expressed, then that authority is derived, partly and importantly, from s 115 of the 1997 Constitution, which is set out in full earlier in these reasons for judgment. A condition precedent to the exercise of that power is that the person to receive a pardon must have been *convicted under the law of the State.*

Section 115 of the 1997 Constitution (which Constitution, it must be remembered, was not abrogated) has to be compared with the power, which the people exercised when s 195 of the 1997 Constitution came into effect, to pardon (in the form of the grant of immunity to) certain persons without them either having an information filed against them or being convicted of an offence under the law of the State. Prior to the 1997 Constitution there was, as previously

indicated, power to grant a pardon, but only after conviction. The power implied in s 195 (before an information has been filed and before conviction) was created for the first time by the 1997 Constitution. The validity or otherwise of that constitutional enactment (s 195) does not arise for consideration in these proceedings.

In *Attorney-General of Trinidad & Tobago v Phillip* [1995] 1 AC 396]; [1995] 1 All ER 93, a decision of the highest persuasive value, the Board of the Privy Council, said, when the Board was emphasising the formal nature of a pardon at common law, (at 102):

> *(A pardon) is an executive act of the State. Both under English law and under the Constitution of Trinidad and Tobago a pardon should not be treated as analogous to a contract. It does not derive its authority from agreement. It is not dependent upon acceptance of the subject of the pardon. In England its authority is derived from the prerogative and in Trinidad and Tobago its authority is dependent upon the Constitution.*

The factual situation which gave rise to that important case is similar in some respects to the situation in Fiji in May to July 2000. The 114 respondents, members of a religious sect known as the Jamaat al Muslimeen, had taken part in an armed insurrection between 27th July and 1st August 1990. About 70 of the group stormed the television building while a second group of about 40 stormed the parliament building. Politicians, including the Prime Minister and other ministers and others, were held at gum point as hostages. The insurrection was intended to overthrow the lawful government of Trinidad and Tobago. During the course of the insurrection the acting President granted a pardon in the form of a general amnesty to the respondents in return for the safe release of all the hostages. After the insurrection had come to an end the respondents were arrested. The pardon in the form of a general amnesty, which was relied upon by the respondents, was ultimately held to be invalid.

Lord Woolf, who delivered the judgment of the Board of the Privy Council in that most instructive decision, went on to state (at 102):

> *A pardon must in the ordinary way only relate to offences which have already been committed … However, while a pardon can expunge past offences, a power to pardon cannot be used to dispense with criminal responsibility for an offence which has not yet been committed. This is a principle of general application which is of the greatest importance. The State cannot be allowed to use a power to pardon to enable the law to be set aside by permitting it to be contravened with impunity.*

In accordance with that principle, s 115 of the 1997 Constitution limits the power of the President to grant a pardon to any person in respect of any offences of which he has been convicted. It does not apply to offences not yet committed, and it does not even apply to offences of which, although he has committed them, he has not been convicted.

Unlike the situation in Trinidad and Tobago in the period since 1976, the President of Fiji was not given, when the 1997 Constitution came into effect, the power to grant any person a pardon, either free or subject to lawful conditions, respecting any offences that he might have committed whether or not he had been charged with any offence and whether or not he had been convicted thereof.

The power given to the president of Trinidad and Tobago to grant a pardon *before* a person is charged with any offence and *before* he is convicted is a relatively new power modelled on the pardoning power given in the United States Constitution to the President of the United States — see

Philip v Director of Public Prosecutions of Trinidad & Tobago [1992] 1 All ER 665. In that Privy Council case, Lord Ackner, in delivering the judgment of the Board, said (at 668):

> *It is interesting to observe that in the American case of Murphy v Ford* (1975) 390 F Supp 1372 at 1373 *decided in the United States District Court for the Western Division of Michigan, in which the validity of a pardon granted by President Ford to former President Nixon was challenged, there is quoted the following observation of Alexander Hamilton in The Federalist No 74 (1788) explaining why the founding fathers gave the President a discretionary power to pardon*
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> *"The principal argument for reposing the power of pardoning… [in] the Chief Magistrate," Hamilton wrote, "is this: in seasons of insurrections or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall".*

It occurs to me that, when the *people of the Fiji islands* gave themselves the 1997 Constitution, they may have missed an opportunity to give to the President a discretionary power to pardon insurgents or rebels in the event of a future Fijian armed insurrection or coup d'etat. Such a power, if given and used sensitively, expeditiously, and with good intentions, might be seen as being an important part of the Presidential armoury.

Commendable as the objective of the Immunity Decree may have been in seeking to bring peacefully to an end the alleged insurrection or rebellion of May–July 2000, those who promulgated it and those who sought to rely upon it made the wrong choice or, as the Fiji Court of Appeal put it in *Chandrika Prasad's* case, "chose, (the wrong) path" (at 28). They chose to adopt and rely upon a procedure which involved turning their backs on the 1997 Constitution. But, even if they had attempted to comply with the 1997 Constitution, the obtaining of a grant of pardon in the form of an immunity from prosecution may have, in the absence of an alteration to the 1997 Constitution, been beyond reach. The nature of the powers and position of the President can be determined only by a consideration of the Constitution itself — (see, in the context of the Constitution of Vanuatu, *Government of the Republic of Vanuatu v President of the Republic of Vanuatu* (Vanuatu SC, Gibbs J, Civil Case No 124/1994, unreported)the judgment of Sir Harry Gibbs, the former Chief Justice of the High Court of Australia (at 8).

Looking simply at the Immunity Decree, and no further, it is clear that, in the context of the criminal law, no more was intended than a conditional undertaking or promise (whether valid or otherwise) not to prosecute under the Penal Code or for breach for any law of Fiji. It was given by Commodore Bainimarama as "Commander and Head" of the Interim Civilian Government with the backing of "the Cabinet" of that government. The President was not involved in the matter and it was apparently not intended that he should be, because that would have only been necessary if this was to be a solemn pardon under the 1997 Constitution, or, at least, the offer of a pardon, and that is not what the proponents of the Immunity Decree evidently intended.

The findings in relation to s 279

For all these reasons I hold that neither the facts alleged by each applicant nor the submissions made on his behalf *prove the plea that he has obtained (a) pardon for his (alleged) offence*. I find that it is *false in fact* that each applicant has been pardoned. Subject to the question of a grant of an adjournment

previously referred to, each applicant will be *required to plead to the information* (s 279 of the Criminal Procedure Code).

Part B

(What follows is subject to a suppression order "until further order" made on 31 May 2002)

Possible directions to the assessors

The Immunity Decree giving no support to the pleas of pardon that have been put forward by the Applicants, it seems to me that, unless further evidence is brought forward to cast a different light on the matter at a trial before assessors, I should direct the assessors, with respect to the Immunity Decree along the lines I have already indicated and along the lines of the conclusions set out in the remainder of these reasons for judgment.

It follows that, in my judgment, the only sort of pardon that can support either applicant's plea is a solemn formal *act of the President* by which, absolutely or conditionally, he forgives or remits, for the benefit of the person to whom it is granted, the legal consequences of a crime *of which he has been convicted*. In post–1997 Fiji that prerogative power is exercised by the *President, acting on the advice of the commission*. That is the way that I will need to direct and sum up to the assessors. It is clear that, on the material before this Court, no person in authority in this case (not even the Commander, Commodore J V Bainimarama, or the Ministers in "the Cabinet" of the Interim Civilian Government) contemplated or authorised anything more than an undertaking not to prosecute. It has not been proven that the matter was ever considered by the commission, and it has not been proven that any relevant act on the part of the President took place. In short, neither applicant was granted a pardon.

The gravity of the court's decision and a remedy

I am conscious of the gravity of a decision on my part that the respondent's submission should be upheld. It may have the effect of stopping the Applicants putting their case based on the Immunity Decree to the assessors, but that would be a matter for each of them. However, in my opinion, the case is a clear one. If I am right about the nature of a pardon as understood by the law, the result is really inevitable that the Immunity Decree be held to be invalid. If I am wrong about that, each applicant will have his remedy elsewhere if, at the end of his trial, he is found guilty of treason.

The alternative plea of immunity

If I should be held to have fallen into error in concluding that the Immunity Decree purports to grant a pardon in the form of an immunity from prosecution, (and, therefore, something more than simply immunity from, prosecution), a question then arises as to the validity of an immunity (as distinct from a pardon) which relates in part to offences not yet committed. It was made on 9th July 2000 but it related, by necessary implication arising from its terms, not only to offences committed between 19th May 2000 and the date of the Immunity Decree (9 July) but also to offences committed between that date (9th July) and 13th July 2000.

Expressed in the terms used, the Immunity Decree opened the way for persons to whom it applied [assuming that they had acted unlawfully prior to 9th July in "(taking) part in the unlawful takeover of the Government democratically elected under the 1997 Constitution on the 19th day of May, 2000" or had acted

unlawfully prior to 9th July "(acting) under the directions, orders or instructions of George Speight or any member of the Taukei Civilian Government as a result of the unlawful seizure of Government powers and unlawful detention of the Prime Minister and certain Cabinet Ministers and Members of the House of Representatives and other persons" acting unlawfully thereafter. Indeed, the proponents of the Immunity Decree would have solicited or incited them to do so or it would have constituted an attempt to procure them to do so.

Counsel appearing for the Applicants did not cite any authority to support the lawfulness of the action in promulgating it in terms embracing immunity from prosecution for both past and *future* offences.

In *D'Arrigo* (1991) 58 A Crim R 71, a decision the Court of Criminal Appeal in Queensland, Australia, where a witness against the appellant had been granted an indemnity not to be prosecuted for future offences committed in the course of a specific police undercover operation, it was held that the prerogative which supports the use of indemnities against prosecution in respect of past acts does not extend to support the issue of licences to break the law in respect of acts which are merely in contemplation. Ministers of State are not, so it was held, above the law and they are not possessed of the dispensing power which the terms of the immunities would generally imply.

DeJersey J (as he then was) said (at 76):

> It is, however, repugnant to the rule of law to conceive of (a Minister of State) granting, in advance, are indemnity in respect of as yet unknown criminal conduct which may occur in the future. As pointed out by Dowsett J, indicating an intention not to prosecute for past breaches of the law may be justified in certain special circumstances, but using an indemnity to encourage future breaches of the law is quite a different matter…The granting of the indemnity probably amounted to counselling within s 7(d) of the Code (although not with respect to a specific offence), and, however well-motivated, therefore simply could not be justified by reference to prerogative power. If otherwise ample enough to extend to the granting of an indemnity in respect of possible future criminal acts, which I would not accept in any event, the prerogative power must be taken to have been cut down statutorily by the implicit prohibition on aiding, counselling and procuring in s 7 of the Codes

The similar (but not identical) provision in the Penal Code of Fiji is s 383. Dowsett J said (at 78):

> It is impossible, consistent with the rule of law, is conceive of the executive excusing anticipated criminal misconduct. Such a course is quite different from indicating an intention not to prosecute for prior misconduct. The latter course does not encourage breaches of the law…

D'Arrigo's case, in which, curiously, there was no express mention of "pardon", was followed a year later in what was then known as the Court of Appeal in Queensland, in *Stead v R* (1992) 62 A Crim R 40. The judgment of the court was delivered by a strong court comprising Davies and Pincus JJA and McPherson SPJ. The clear implication from a reading of that judgment is that immunity from prosecution or indemnity or amnesty is but different ways of characterising the prerogative of pardon. Such a conclusion is, importantly, also implicit from a reading of the judgment of the Board of the Privy Council in *Attorney-General of Trinidad and Tobago* above.

In *Stead's* case the court traced the history of the prerogative of pardon and applied it to a situation in which the appellant had been granted an indemnity in advance of crimes to be committed, and said (at 44):

The common law recognised the existence of a power to pardon as an aspect of the royal prerogative and one that was capable of being delegated. What was disputed over a long period was the wider claim by the Crown to exercise a power of pardoning an offence before its commission. It implied an authority in the Crown to dispense with the application of the law to a particular individual or to suspend the operation of laws in general. Attempts to invoke such a power led to the Revolution of 1688 and the adoption of the Declaration of Right. Articles I and 2 condemned as "illegal" the purported exercise of the power of suspending or dispensing with laws, "as it hath been assumed and exercised of late". It was the insertion of these qualifying words that is said to have preserved the prerogative of the Crown to pardon offences after they had been commuted: Taswell-Langmead's English Constitutional History (9th ed, 1929), p 601, n (o). Enacted by Parliament as s 1 of the statute I Will & Mary, sess 2, c 2, the Bill of Rights 1688 contained in s 2 the further provision that "no dispensation … of or to any statute or any part thereof shall be allowed, but that the same shall be held void and of no effect…"

The prerogatives or powers of her Majesty are now exercisable in respect of Queensland in general by the Governor on the advice of the Premier of the State: see s 7(2) and (5) of the Australia Act 1986 (Cth) and of the Australia Act 1986 (UK), incorporated in the second schedule to the Australia Acts (Request) Act 1985 (Qld). It is true that s 8(b) of the Constitution (Office of Governor) Act 1987(Qld) authorises the Governor to grant a pardon to an "offender" in respect of an offence; but the words "pardon", "offender" and "offence" imply that the offence is one that has already been committed and not one to be committed in the future. In any event, any claim in right of the Crown in Great Britain to dispense with laws, whether by pardoning in advance or otherwise, was brought to an end in 1689, and it is not possible for such a power to have been transmitted to the Crown in respect of Queensland by legislation, such as that we have mentioned, enacted only in 1985, 1986 or 1987.

It follows that, while the Governor acting on the advice of the Premier has power to grant a pardon in respect of a past offence, neither the Governor, nor any delegate from him or her, has power to suspend or dispense with the laws or their execution, or with any statute: cf Fitzgerald v Muldoon [1976] 2 NZLR 615 at 622–623. *The attempt to do so by what purported to be an indemnity against prosecution for future offences granted by the former Attorney-General in favour of Reisenweber on 5 October 1989 therefore was, to use the words in ss 1 and 2 of the Bill of Rights, "illegal" and "void and of no effect". Hence the indemnity was incapable of prevailing against the provisions of s 7 of the Criminal Code making a person criminally responsible for an offence committed by another that was counselled or procured or assisted by that person.*

The history of the prerogative of pardon had also been traced by Cox J and referred to by Wells J in *R v Milnes & Green* (1983) 33 SASR 211, per Cox J at at 215–6, and per Wells J at pp 233–5. That South Australian Supreme Court decision had been referred to by the Privy Council in *Attorney-General of Trinidad & Tobago* above at 108.

It was for the reasons quoted *above* that the Court of Appeal in Queensland (in *Stead's* case) held that the indemnity (or pardon) was invalid. Applying the same reasoning in the present case I conclude that the prerogatives or powers previously exercised by her Majesty are now exercisable in respect of Fiji by the President on the advice of the commission: see the 1997 Constitution, which, I repeat once more, has not been abrogated. It is true that s 115 of the 1997 Constitution empowers the President to grant a pardon to a person in respect of offences of which he has been convicted; but the words "pardon" and "offence" imply that the offences are ones that have already been committed and not ones some (or all) of which are to be committed in the future. The consequence in law is that, for political offences committed and for acts done in

respect of which immunity was purportedly granted under the Immunity Decree, the Applicants derive no immunity from that Decree. The Immunity Decree did not have the effect of depriving any of the acts done of their criminal character. It simply promised, albeit invalidly, that the Applicants (and others) would not be prosecuted for what they may have done in the course of the events of May to July 2000.

Parliamentary sovereignty

Another ground upon which the Immunity Decree may be said to be invalid was mentioned by the Chief Justice of New Zealand, Wild CJ, in *Fitzgerald v Muldoon* [1976] 2 NZLR 615, referred to in the passage quoted from *Stead's* case above. That is what counsel for the prosecution may have been saying in paragraph 67 of their written submissions.

I am persuaded to hold that, in signing and publishing the Immunity Decree, the "Commander and Head of Government", in purported exercise of the powers under s 9 of the Interim Civilian Government (Establishment) Decree No 10 of 2000, was acting illegally in seeking to suspend the Penal Code without the consent of parliament. Parliament had made the law. The law could be amended or suspended only by parliament or with the authority of parliament.

If I may adopt and adapt (to the situation in Fiji in the year 2000) the words of *Dicey's Law of the Constitution*, 10th ed, p 39 set out in the passage cited by Wild CJ in *Fitzgerald* above at 62, the principle of parliamentary sovereignty means neither more nor less than this, namely, that parliament has, under the 1997 Constitution of Fiji, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of Fiji as having a right to override or set aside the legislation of parliament.

For these reasons also the Immunity Decree may be said to be invalid.

The right to equality before the law and constitutionality

The 1997 Constitution incorporates a Bill of Rights (Ch 4). The commander (Commodore J V Bainimarama), as a person purporting to perform the functions of the public office of "Head of Government" and perhaps purporting to act on behalf of "the executive branch of government … at the central level" [s 21(1)], was bound inter alia by the Bill of Rights and, in particular, s 38 which guarantees to every person the right to equality before the law and provides protection from any purported "law (or) administrative action" which "directly or indirectly imposes a disability or restriction … on a prohibited ground".

Regardless of the motives behind the issuing of the Immunity Decree, whether the commendable one of securing the release of the hostages and bringing peacefully to an end the insurrection or rebellion or otherwise, the immunity decree, by its terms, places the persons in whose favour it was brought into existence in a privileged position compared with that of ordinary persons committing offences or breaking the law. It also restricts the victims of the alleged crimes (no doubt many in number) and the persons who might otherwise have civil claims or be entitled to seek a remedy or relief in legal proceedings (no doubt some having incurred substantial losses) from pursuing such claims or entitlements.

The idea of legal equality is fundamental to the rule of law; everyone, whatever his or her rank or condition, is under the same responsibility for an illegal act as that of any other citizen: see A Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed, Macmillan, 1965, p 193 and Clayton and Tomlinson *The Law of Human Rights*, p 1207.

In *Matadeen v Pointu* [1998] 3 WLR 18, an appeal to the Privy Council from a decision of the Supreme Court of Mauritius which involved the construction of the Constitution of Mauritius, the Board of the Privy Council said (at 26):

> *Their Lordships do not doubt that such a principle ("equality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently") is one of the building blocks of democracy and necessarily permeates any democratic Constitution. Indeed, their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour …*

and went on to set out (at 27) some further principles, all of which, in my judgment, form part of the law of Fiji:

> *A self-confident democracy may feel that it can give the last word, even in respect of the most fundamental rights, to the popularly-elected organs of its Constitution. The United Kingdom has traditionally done so … (As) experience in many countries [including Fiji] has shown … certain fundamental rights need to be protected against being overridden by the majority [or, I would add, by any group of rebels exercising de facto power]. No one has yet thought of a better form of protection than by entrenching them in a written Constitution enforced by independent judges.*

I would be acting contrary to the judicial oath which requires of a judge to "uphold the Constitution and … do right to all manner of people in accordance with the laws and usages of the Republic without fear or favour, affection or ill-will" if I purported to allow a power of granting immunity from prosecution to be exercised by the Interim Civilian Government with unfair discrimination in the enforcement of the criminal and civil laws of Fiji.

In *Edwards v Society of Graphical & Allied Trades* [1971] Ch 354, Lord Denning said in England (at p 376):

> *The courts of this country will not allow … power to be exercised arbitrarily or capriciously or with unfair discrimination, neither in the making of rules, nor in the enforcement of them … If the (authority purporting to exercise power) should assume to make a rule which destroys a right or puts it in jeopardy — or is a gratuitous and oppressive interference with it — then (the authority) exceeds its powers. The rule is ultra vires and invalid*

For these reasons also the Immunity Decree may be said to be unconstitutional, void and of no effect. The assessors may need to be directed that the Immunity Decree infringes a protected human right.

Other grounds relied upon by the prosecution

In these reasons I have attempted to deal with all the grounds relied upon by the respondent (or implied by counsel) in order to establish the invalidity of the Immunity Decree, save and except grounds (f) and (g).

Regarding those two grounds, I conclude that it is not to the point that the Immunity Decree "did not purport to be a pardon". It is what it is and not what it purports to be that is important. The intention of those who published it (or of those who sought to rely upon it) is of no moment. Further, I am not persuaded that the power to grant immunity from prosecution rests exclusively with the Director of Public Prosecutions; the constitutional provisions relied upon (including s 114 of the 1997 Constitution) do not deal expressly with the power to grant such immunity, and the common law provides, I think, no more to a person holding a valid promise not to prosecute granted by lawful authority than an opportunity to seek a stay of proceedings in the event of a prosecution.

Some observations regarding the applicants' submissions

It follows that I am not persuaded by the arguments advanced on behalf of both Applicants. However, out of respect for counsel for each accused and for the submissions they each made, I make a number of observations which may be of some assistance if, in due course I am looking to counsel for their assistance towards the end of a trial proper as to the form of any charge (or direction in a summing-up) to the assessors a possible defence of immunity might take.

(a) The doctrine of necessity

Both applicants relied heavily upon the Lord Pearce formulation of the doctrine of necessity which, was adopted as an expression of the law in Fiji (see *Chandrika Prasad's* case above at 48).

In *Chandrika Prasad's* case the court said (at 27):

> *The doctrine of necessity enables those in de facto control, such as the military, to respond to and deal with a sudden and stark crisis in circumstances which had not been provided for in the written Constitution or where the emergency powers machinery in that Constitution was inadequate for the occasion. The extra-constitutional action authorised by that doctrine is essentially of a temporary character and it ceases to apply once the crisis has passed.*

And (at 28):

> *The doctrine would have authorised (the Commander) to have taken all necessary steps, whether authorised by the text of the 1997 Constitution or not, to have restored law and order, to have secured the release of the hostages, and then, when the emergency had abated, to have reverted to the Constitution. Had the Commander chosen this path, his actions could have validated by the doctrine of necessity. Instead, he chose a different path, that of constitutional abrogation …*

Their Lordships, Casey JA(presiding) and Barker, Kapi, Ward and Handley JJA, in a section of their reasons for judgment headed "Legality of Intervening Acts", concluded their references to passages from both the majority and the dissenting judgments in *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 with Lord Pearce's dictum:

> *I accept the existence of the principle that acts done by those actually in control without lawful validity may be recognised as valid or acted upon by the courts, with certain limitations namely (a) so far as they are directed to and reasonably required for ordinary orderly running of the State, and (b) so far as they do no impair the rights of citizens under the lawful … Constitution, and (c) so far as they are not intended to and do not in fact directly help the usurpation …(p 732)*

and then said (at 48):

> *We respectfully adopt this statement as an expression of the law applicable in Fiji.*

Although, it might be argued that the principle accepted by Lord Pearce is not strictly part of the *ratio decidendi* of *Chandrika Prasad's* case and is no more than *obiter dictum* because it goes much further than a consideration of the validity of the 1997 Constitution itself (and purports to consider "*the extent to which the decrees, executive acts and decisions of the administration since 19 May 2000 are to be recognised as valid*" — see p 47), I deem it right and proper to treat it as a *judicial dictum* and, therefore, of the greatest persuasive value. While it may not have formed an integral part of the train of reasoning directed to the real question that was decided [*Cornelius v Phillips* [1918] AC 199 per Viscount Haldane at 211], it was a considered enunciation of their Lordships' opinion of the law on the point [*Richard West &*

Partners (Inverness) v Dick [1969] 2 Ch 424 per Megarry J at 431] and it was a deliberate expression of opinion given after consideration [*Slack v Leeds Industrial Co-operative Society Ltd* [1923] 1 Ch 431 per Lord Sterndale MR at 451]. I am content (indeed, I am, bound) to proceed upon the basis that the Pearce formulation represents the law in Fiji today.

Applying the Pearce formulation to the facts of this case, the two Applicants, as members of the Taukei Civilian Government or as persons acting under the directions, orders or instructions of George Speight or a member of the Taukei Civilian Government cannot bring themselves within that formulation. I so conclude because, on the evidence before me in this *voir dire* hearing, although (a) the Immunity Decree may have been "reasonably required for ordinary orderly running of the State, nevertheless (b) the Immunity Decree "Impaired (or restricted) the rights of citizens under the lawful Constitution" (see these reasons for judgment under the heading "The right to equality before the law and constitutionality") and, in particular, "impaired the rights" of the victims and (c) the Immunity Decree, whatever its true intentions, did, in fact, purport "directly to help or entrench the usurpation" in that it purported to remove criminal and civil liability from the alleged usurpers, thereby assisting them personally to avoid responsibility for their actions, and it did "run contrary to the policy of the lawful (President)". I have there used the additional words of Lord Pearce that immediately followed the passage cited from his Lordship's dissenting judgment which the Court of Appeal had adopted as an expression of the law applicable in Fiji. It is implicit in the words of the President, Ratu Sir Kamisese Mara, in his Address to the Nation on 20th May 2000 that, as a matter of public policy, the coup leaders would never be treated as being above the law. The President said *inter alia*:

> *The perpetrators should not underestimate my unshakable determination to maintain the integrity and stability of the State and to protect the rights and interests of the people.*
>
> *Let me assure you that the Constitution of the Fiji Islands and the institutions of the State remain intact.*

Events subsequent to the coup of May to July 2000 would seem to show that the stance adopted by the President was vindicated, and there is no reason to suppose that the "public policy of the lawful (State of the Republic of Fiji)" ever changed thereafter. In addition, the Immunity Decree was "hostile, in its mode of enforcement, to the authority of the (lawful) Government" [see *Horn v Lockhart* (1873) 84 US (17 Wallace) at 570, 580 cited without disapproval by the Fiji Court of Appeal in *Chandrika Prasad's* case above at p 48].

I have not been persuaded that *Chandrika Prasad's* case, whether in reliance upon *Madzimbamuto v Lardner-Burke* or otherwise, decided that the doctrine of necessity can, in any unqualified way, be "prayed in aid of measures purportedly introduced by a usurper", to use the words used in paragraph 40 of the written submissions filed on behalf of the State. I have nevertheless been persuaded that in *Chandrika Prasad's* case it was "acknowledged that certain decrees, executive acts and decisions of the administration since 19 May 2000 may be valid under the doctrine of necessity", to use the words used in paragraph 4.3 of the written Submissions filed on behalf of the applicant Josefa Nata.

If there be ambiguity in what the Court of Appeal meant when it said that it adopted, "as an expression of the law applicable to Fiji," the statement of principle that "acts done by those actually in control without lawful validity may be recognised as valid or acted upon by the courts with a certain limitation"

namely *inter alia*..."(b) so far as they do not impair the the rights of citizens under the lawful Constitution," it is legitimate to have regard to the fact that the Constitution does not operate in a vacuum. It speaks from the people and to the people of Fiji. It also speaks to the international community as the basic law of the independent Republic of the Fiji Islands which is a member of that community — see the High Court of Australia decision in *Kartinyeri v Commonwealth of Australia* (1998) 72 ALJR 722. To adopt (with only minor modifications) the sentiments so passionately expressed by Kirby J in that case (at 766) and to apply them to Fiji at this time, "if there is one subject upon which the international law of fundamental rights resonates with a single voice," it is the right to equality before the law [s 38(1)] and the closely-related "prohibition of detrimental distinctions on the basis of race, ethnic origin etc". [s 38(2)].

What I am persuaded about is that *Madzimbamuto's* case is authority for the proposition that, unless and until it is clear that a usurping regime has succeeded in ousting a rival claim to authority from the preceding regime, the usurping regime will be regarded as illegal and the operation of the doctrine of necessity to give force of law to measures enacted by a usurper is, except to a limited extent, to be seen as excluded [see *Asma Jilani v Government of Punjab* [1972] PLD SC 139 at 242–43].

In any event, I am in no doubt that that doctrine does *not* apply in the circumstances here. The Lord Pearce formulation, if applied, does not assist the Applicants.

(b) Ostensible authority

With all due respect to both Mr. Vuataki and Ms. Waqavonovono, I do not see how a principle of ostensible authority has any application in the context of a purported grant of pardon. In any event, neither cited any authority to support a submission in that respect.

(c) Abuse of process

In so far as each applicant alluded to abuse of process, a situation calling for a stay of proceedings on that ground would only arise if the State were, notwithstanding a finding that the Immunity Decree was valid, to continue to prosecute and rely upon certain overt acts said to have occurred during the period covered by the immunity. I respectfully agree with the position adopted by each applicant in this regard. However, the Immunity Decree cannot properly be said to be valid. Except to the extent just indicated, neither applicant relied upon a claim that there had been an abuse of process and no application for a stay of proceedings on that ground was made.

Attachments

I attach, as App A to these reasons for judgment, a photocopy of paragraphs 2 to 35 inclusive of the written submissions of Mr Gerard McCoy QC and Mr Peter Ridgway and Mr Raymond Pierce relied upon on behalf of the State. Those paragraphs set out important matters of history. Neither Mr. Vuataki (except to the extent referred to in paragraph 2 of his written submission in reply) nor Ms. Waqavonovono dispute anything set out therein, and so App A is to be taken as a guide to the constitutional events between 10th October 1970, when Fiji gained independence, and more particularly, between 9th October 1987, when Fiji was declared a Republic, and 1st March 2001, when *Chandrika Prasad* above was decided. I make findings of fact in accordance with appendix A.

I also attach, as App B to these reasons for judgment, a photocopy of pp 17–20 of the reasons for judgment of Gates J in *Chandrika Prasad v Republic of Fiji and the Attorney-General of Fiji* (High Court of Fiji, Action No HBC 0217/00L, 15 November 2000), which set out the facts about which there is no dispute and in accordance with which I make findings for the purposes of this *voir dire* hearing.

Attached, as App C to these reasons for judgment, is a chronology of the steps taken in relation to and in the course of this *voir dire* hearing.

Appendix D, also attached to these reasons for judgment, is a list of the exhibits tendered during this *voir dire* hearing. It is not necessary for the purpose of determining whether it is *true to fact or nor that each applicant has attained a pardon for his offence* that I resolve any disputes of fact arising from a consideration of the affidavits that were tendered. I find, importantly, that Ex A1 was the Immunity Decree which was made on 9th July 2000 and published on 13th July 2000. That is the document upon which both Applicants rely and which constitutes, so it was submitted on behalf of each applicant, a pardon and/or provides him with immunity from prosecution.

Appeal dismissed.